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ADMINISTRATIVE AGENCY INTELLIGENCE- GATHERING: AN APPRAISAL OF THE INVESTIGATIVE POWERS OF THE INTERNAL REVENUE SERVICE

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The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Mr. Justice Brandeis, dissenting, in *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

A Commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile.

Mr. Justice Cardozo, joined by Mr. Justice Brandeis and Mr. Justice Stone, dissenting, in *Jones v. Securities and Exch. Comm'n*, 298 U.S. 1, 33 (1936).

I. INTRODUCTION

As the decision-making functions of governmental institutions in contemporary society grow in complexity and breadth, the need for information as a basis for performing these functions grows at a commensurate, if not a greater, rate. This need, in turn, has been reflected in a widespread increase in demands by decision-makers for expansion of the quantities and kinds of instruments and strategies of intelligence-gathering available to them. In general, the response has been the

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creation of new strategies and instruments of investigation which can be placed within a continuum between pure persuasion, at one extreme, and high coercion, at the other. These devices include highly sophisticated mechanical systems, such as polygraphs, drunkometers, data processing equipment, electronic eavesdropping devices, radar, U-2 reconnaissance aircraft and spy-in-the-sky satellites, as well as such legal techniques as pre-trial discovery and the compelling of testimony in exchange for immunity from prosecution.

In behalf of the individuals, groups or institutions from whom the needed information is sought and against whom the various strategies and instruments are used, claims are frequently made to impose limitations upon the intelligence-gathering process. These claims are usually founded upon legal doctrine—constitutional or statutory protections and privileges in the case of domestic claims, and theories of the rights of sovereign states in the case of international claims.¹ The doctrines, in turn, are ordinarily based on policies which favor personal, group or institutional security and freedom from invasions of privacy.

In responding to such claims, the decision-makers with primary authority to limit intelligence-gathering have frequently focused their attention on underlying policies, and not on the legal doctrine. The decisive question is whether the functions which are performed and the interests served by the governmental institution seeking the information are more or less important than the interests threatened by the use of the strategy or instrument which is attacked.²

In the United States the immediate interests served by the governmental body have frequently given way to the interest of the individual or the group in their own security or "right to be let alone."³ The absence of effective alternative methods of intelligence-gathering

¹ The suggested analogy between domestic claims and international claims may be interesting, but should not be carried too far. There are obviously important legal and policy differences between claims by the Soviet or Cuban governments for cessation of overflights by American U-2 aircraft and claims by an individual in an American court to have his conviction set aside because of a coerced confession or an unreasonable search.

² This is especially common in the international arena, where vital decisions are ordinarily made by the officials of nation-states rather than by judicial decision-makers appealing to a well-developed body of legal doctrine. In the international arena, the interests served by the governmental institution may well be all the values of the society it represents, while the interests threatened by a continued use of the challenged strategy or instrument may include those very same values, since the nation under observation may have the power and the will to resort to force to prevent further intelligence-gathering. This would tend to account for the fact that the United States responded differently to Soviet demands to stop overflights than to similar claims by the Cubans. In the former case policy dictated resort to an alternative—satellites—however ineffective, in order to avoid serious consequences realistically perceived. In Cuba's case, the balancing process has so far failed to predominate in favor of a similar decision.

³ See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *McNabb v. United States*, 318 U.S. 332 (1943); *Boyd v. United States*, 116 U.S. 616 (1886).

has not been a major factor in such decisions largely because the policies of the government as a whole, expressed generally in the Constitution, have coincided with the claimant's interest in security against governmental intrusion even if the interests immediately served by the government agency seeking the information did not.

In general this balancing has worked against those performing the intelligence function where the strategy is one involving substantial coercion,⁴ where the instrument used operates surreptitiously,⁵ where the strategy is not regulated by institutional safeguards,⁶ where the purpose of the investigation is to provide information which might lead to punishment of the party against whom the strategy is directed for the commission of a crime⁷ and, particularly, where more than one of these elements converge. In such cases the dangers to private security have usually been quite clear, and individual-protective policies embodied in constitutional and legislative provisions have tended to prevail over the policies which would be served by the acquisition of the information.

There is one area, however, where the balance in the last thirty years has worked in favor of the governmental body seeking information and against the private individual or group. In the main, the demands of administrative agencies for more information to support their functions have been gratified, in the courts and in the legislature, by expansion of the inquisitorial powers of such agencies and by contraction of the right to withhold the needed information.⁸ Most of the investigations conducted by these agencies do not strike the nerve-chords mentioned above. The only coercion involved is by judicial process; the instrument of investigation is usually the taking of testimony and examination of books and records rather than surreptitious devices; the process is surrounded by judicial safeguards by which the investigated party is given access to the courts to complain of abuses; and the authorized use of the information sought is for purposes other than invoking the criminal laws. In the absence of such factors, the legislative policies carried out by the information-seeking agency have been deemed, on balance, to be more worthy of advancement than the recusant witness's abstract right to be let alone.⁹

In such cases the Supreme Court has tended to generalize the

⁴ *Culombe v. Connecticut*, 367 U.S. 568 (1961); *McNabb v. United States*, *supra* note 3.

⁵ See § 605 of the Communications Act of 1934, 48 Stat. 1103; *Silverman v. United States*, 365 U.S. 505 (1961); *Benanti v. United States*, 355 U.S. 96 (1957).

⁶ *Wong Sun v. United States*, 371 U.S. 471 (1963); *Mapp v. Ohio*, *supra* note 3.

⁷ *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Hoffman v. United States*, 341 U.S. 479 (1951).

⁸ See 1 Davis, *Administrative Law Treatise* § 3.14 (1958, Supp. 1963).

⁹ *Ibid.*

problem, treating most administrative agency investigations alike without regard for or sensitivity to differences among them.¹⁰ Yet there may be factors, associated with the investigatory activities of some agencies, which would shift the balance in favor of a contraction or, in some situations, even an expansion,¹¹ of their inquisitorial powers. Where the presence of such factors is suspected in the case of a particular agency, re-examination of the interests affected by its investigations would seem to serve a useful purpose.

It is my intention to focus upon the Internal Revenue Service, the most ubiquitous of all administrative agencies. My approach will be to examine and clarify the policies at stake in light of the societal conditions which affect those policies; to establish some policy goals which ought to be served by tax investigations and by the limitations imposed upon such investigations; to describe the trends in decision-making which have affected the investigatory powers of the Service; to attempt to predict the implications of past decisional trends in light of conditions which might bear upon future decisions; and, lastly, to suggest alternatives to current practices which will tend to accommodate the important policies which compete for dominance.¹²

II. CLARIFICATION OF POLICIES

The Supreme Court, in *United States v. Powell*,¹³ has recently held that a summons issued by the Internal Revenue Service for the production of tax records will be judicially enforced without a showing of probable cause to suspect fraud, even though the records under investigation have been subjected to an earlier examination and the statute of limitations on ordinary tax liability has barred additional assessments except for fraud. The conflict of values resolved by the decision was not discussed, the Court resting its decision upon earlier precedents established in cases dealing with other federal agencies and upon statutory interpretation. A comparison of two earlier courts of

¹⁰ See, e.g., *United States v. Powell*, 379 U.S. 48 (1964) where the Court stated: "While the power of the Commissioner of Internal Revenue derives from a different body of statutes, we do not think the analogies to other agency situations are without force when the scope of the Commissioner's power is called in question." *Id.* at 57. But compare *Hannah v. Larche*, 363 U.S. 420 (1960), where the Court drew a distinction between agencies engaged in adjudicatory functions and those which did not have the power to adjudicate rights.

¹¹ In *Hannah v. Larche*, *supra* note 10, the Court held that the Civil Rights Commission was not obliged to accord witnesses before it the rights of confrontation, appraisal or cross-examination since, unlike other agencies, it was not performing an adjudicative function. See further discussion in the text at Pt. III(A)(3), *infra*, following note 84.

¹² McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 Am. J. Int'l L. 1 (1959), reprinted in McDougal & Associates, *Studies in World Public Order* 3 (1960). My approach attempts to follow, somewhat impressionistically, the methodology suggested in these sources.

¹³ *Supra* note 10. Accord, *Ryan v. United States*, 379 U.S. 61 (1964) (companion case).

appeals opinions in which the policy preferences were articulated will serve to highlight the premises underlying that conflict.

In *O'Connor v. O'Connell*¹⁴ the Court of Appeals for the First Circuit reversed a district court order compelling a taxpayer to obey a summons issued to him by the IRS. The summons had directed the taxpayer to appear and testify with respect to possible tax deficiencies for years which, except for fraud, were closed to assessment by the statute of limitations. In support of the order, a special agent had testified that, as a result of his calculations, he honestly believed the taxpayer had filed false returns for the years under examination. In reversing, the court held that a purely subjective suspicion of fraud on the part of the revenue agent was an insufficient basis for granting court enforcement of the summons. Speaking for the court, Judge Woodbury stated:

[B]efore the tax authorities are entitled to a district court order enforcing a summons directing a taxpayer to testify as to a closed year they must establish to the district court's satisfaction that a reasonable basis exists for a suspicion of fraud, or put another way, that there is probable cause to believe that the taxpayer was guilty of fraud in a statute barred year.¹⁵

Only a short time later the Court of Appeals for the Second Circuit handed down a ruling which contrasted sharply with that in *O'Connor*. In *Foster v. United States*,¹⁶ the court refused to vacate a district court order directing the local agency of a foreign bank to comply with a summons issued by the IRS ordering the bank to produce records relating to the accounts of Foster, whose tax liability was under investigation. In his opinion, Judge Hincks brushed aside the taxpayer's contention that a summons in aid of an investigation of tax years barred from assessment by the statute of limitations except for fraud could be enforced only upon a showing of probable cause for believing that those years were still open to assessment. He stated: "[T]he Commissioner, as a condition to the issuance of a summons under §§ 7602 and 7604, should not be required to prove grounds for belief that the liability was not time barred 'prior to examination of the only records which provide the ultimate proof.'"¹⁷

While the "third party" examination involved in the *Foster* case perhaps presented a stronger case for summons enforcement than the fact situation in *O'Connor*,¹⁸ attempts to reconcile the conflicting ap-

¹⁴ 253 F.2d 365 (1st Cir. 1958).

¹⁵ *Id.* at 370.

¹⁶ 265 F.2d 183 (2d Cir.), cert. denied, 360 U.S. 912 (1959).

¹⁷ *Id.* at 187.

¹⁸ In *O'Connor* the summons was issued on February 7, 1957, requesting taxpayer to

proaches taken by the two courts on a purely factual basis prove frustrating. In the first place, Judge Woodbury expressly rejected the reasoning in the line of tax summons cases relied upon by Judge Hincks to support his decision in *Foster*.¹⁹ Secondly, Judge Hincks, while noting that *O'Connor* involved a summons directed personally to the taxpayer rather than a third-party summons, refused to rest his decision on this distinction, preferring a "broader ground."²⁰

Rather, the decisions in these cases represented a serious difference of opinion concerning the rights of witnesses in administrative investigations in general, and in tax investigations in particular. "Constitutional immunity from unreasonable searches," said Judge Hincks, "does not relieve a citizen of the testimonial duty to disclose information needed for the just and proper discharge of governmental functions."²¹ Judge Woodbury, however, proclaimed that his decision was

in accord with the limitations upon the inquisitorial powers of government which have become traditional in this country. We agree with Judge Moscovitz' statement in *In Re Brooklyn Pawnbrokers, Inc.* . . . that "to permit the government to examine as to statute barred years upon a mere conclusory allegation of fraud is to deprive the taxpayer of that freedom from unreasonable harassment which he has a right to expect under a democratic form of government."²²

Thus the issue may be framed as a conflict between governmental power and private rights; this is a conflict very similar to that which,

testify as to his and his wife's tax liability for the years 1943 to 1954. At the hearing, the taxpayer refused to answer questions only as to the years 1943 to 1947, for which the taxpayers had filed returns (although the 1943 return had been destroyed by the revenue officials). The taxpayer asserted that counsel who had prepared the returns in question had died and that the accountant who assisted in their preparation was over 80 years old and suffered from a defective memory. The asserted basis for the investigation was that the agent's calculations, based on the early returns, had indicated a substantial untaxed increase in taxpayer's net worth for the years in question. In *Foster*, the summons was issued on August 29, 1957, requesting the third party, a bank, to appear and produce books, papers and records with respect to the period 1949 to 1956. The taxpayer, who had maintained no account in the bank since August, 1949, objected to the examination of the bank's records for the period prior to that time. The examining agent urged in his affidavit that the examination of the requested books and records "afford the only opportunity" for the government to determine whether income excluded by the taxpayer actually constituted taxable income. There was no specific allegation that the passage of time had put the taxpayer in a more difficult position because of faded memories or absence of witnesses, as there was in *O'Connor*.

¹⁹ See *Foster v. United States*, supra note 16, at 186; *O'Connor v. O'Connell*, supra note 14, at 369.

²⁰ *Foster v. United States*, supra note 16, at 188 n.3. The Court of Appeals for the Second Circuit had earlier arrived at the same result in an investigation of the taxpayer himself in *Application of United States (Carroll)*, 246 F.2d 762 (2d Cir.), cert. denied, 355 U.S. 857 (1957).

²¹ *Foster v. United States*, supra note 16, at 188.

²² *O'Connor v. O'Connell*, supra note 14, at 370.

in large measure, helped create the furor which led to this nation's drive for independence and which is still the cause for ringing dissents and exalted prose.²³

Isolating the general nature of the conflict as one involving the fundamental ideals of our society, however, is only a first step, since the dangers to individual rights in IRS investigations may not be as apparent as those which were present when James Otis inveighed against the "odious writs of assistance." The legitimate informational needs of the agency are much greater than the founding fathers could have contemplated, and the methods of filling these needs are more subtle and complex. The temptation to give in to the government's demand is almost irresistible, especially when one considers the ultimate public benefit.

The Supreme Court has generally yielded to that temptation in passing upon the investigatory powers of administrative agencies.²⁴ Thus, the *O'Connor* case, even before it was overruled in *Powell*, seemed to be an anachronism. The Supreme Court has not, however, undertaken to root out the special problems involved in federal tax investigations, but has accepted analogies to other agencies rather uncritically.²⁵

Considering the fact that our society's traditional concern with the preservation of the integrity and dignity of the individual is one of the main features which distinguishes it from the tyrannous regimes we profess to abhor, it would not seem wise merely to categorize the rationale of *O'Connor* as aberrant or anachronistic and reject it out of hand. Instead, it becomes relevant to ask whether there are any factors involved in tax investigations which might cause the scales to register a different result.

On the side of the public interest it must be conceded that an adequate source of revenue is the *sine qua non* of effective governmental operation in a modern society; of this there can be no serious dispute. Moreover, it must be added that the self-assessment system of taxation would probably founder if adequate means of investigation were not provided for the IRS. Accordingly, the public interest in effective instruments of tax collection, including adequate power of investigation, weighs as heavily on the scale as does the public interest in any regulatory program or, for that matter, in any authorized governmental activity supported by tax dollars.

On the other side of the scale, however, the interest in private

²³ See, e.g., *Shapiro v. United States*, 335 U.S. 1, 36 (1948) (Frankfurter, J., dissenting); *Hubner v. Tucker*, 245 F.2d 35, 41 (9th Cir. 1957); Griswold, *The Fifth Amendment Today* (1955). For a discussion of the historical background see *Boyd v. United States*, *supra* note 3, at 624-30, 635.

²⁴ *Davis*, *supra* note 8, at § 3.14.

²⁵ See cases cited in note 10 *supra*.

security may weigh more heavily in revenue investigations than in those conducted by other agencies. In the first place, the investigatory power placed in the hands of the Internal Revenue officials is bound by no practical limitations with respect to the possible objects of its attention. No documentation is needed to show that practically every person or firm, trust, or charity resident in the United States and its territories is subject to investigation regarding its own tax liability or the tax liability of others with whom it deals. The requirements of relevance and materiality, on the other hand, are more likely to operate as effective limitations on the range of objects of investigations conducted by other agencies charged with more specialized functions; in such cases the summoned party's relationship, or lack of relationship, to an authorized purpose of investigation may be obvious.

This fact, that everyone is an appropriate target of tax investigations, becomes significant as a result of other considerations unique to the IRS. First, the type of data collected by the Service can be of immense value to hundreds of other agencies and institutions, be they state or federal, public or private. It is of special importance to the officials and organs charged with the function of invoking criminal prescriptions, such as prosecutors and crime commissions.²⁶ In the hands of persons interested in destroying political enemies or persecuting members of society deemed by them to be undesirable, its utility is obvious.²⁷ Even the IRS itself has, on occasion, attempted to use

²⁶ The most obvious examples are the situations where the information can be used to prosecute a known gangster for tax evasion, see *Capone v. United States* 56 F.2d 927 (7th Cir.), cert. denied, 286 U.S. 553 (1932) and *Capone v. United States*, 51 F.2d 609 (7th Cir.), cert. denied, 284 U.S. 669 (1931); or where the primary purpose of a particular federal tax is not to raise revenue but to provide information to officials who will prosecute criminals under state criminal laws. See *United States v. Kahriger*, 345 U.S. 22 (1953), in which the Supreme Court upheld the validity of the federal tax on persons engaged in the business of accepting wagers, Int. Rev. Code of 1954, §§ 4401-05, 4411. See also Anderson, *What Price Conviction*, A.B.A. Section of Criminal Law Proceedings 42 (1958), in Paulsen & Kadish, *Criminal Law and Its Processes* 978 (1962):

Finally, I would like to say just briefly that we are attacking the question of organized crime in a new way. . . . What we need to fight them, we feel in the Department of Justice, is a long-range, permanent plan built into the Department of Justice. We also attach to that the idea of looking at individuals, picking the top hundred, and attacking them by looking at everything they do, rather than looking to see if they violate the narcotics law, or looking to see if they violate the Hobbs Racketeering Act. We are looking at everything they do, and we are coming up with evidence of antitrust violations where they have crept into business.

We are finding Taft-Hartley violations, Securities Exchange violations, Food and Drug violations, and we are going to use this idea of looking at the individual and trying to map out everything that he is doing, concentrating on him as a means of trying to break up organized crime.

Cf. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 *Law & Contemp. Prob.* 64 (1948); Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 *Yale L.J.* 1 (1932).

²⁷ See Edmund Wilson's fiery polemic in *The Cold War and The Income Tax: A*

its investigatory powers for unauthorized purposes,²⁸ and reciprocal exchanges of information with other agencies of government have become commonplace.²⁹

Secondly, few other federal administrative agencies have as many permanent personnel with delegated investigatory powers located in every major section of the country as the IRS has today.³⁰

Protest 26 (1963). Cf. *People v. Darcy*, 59 Cal. App. 2d 342, 139 P.2d 118 (1943); Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103 (1961) and Note, *Discriminatory Law Enforcement and Equal Protection From the Laws*, 59 Yale L.J. 354 (1959).

Claims that candidates for political office have evaded income taxes, widely publicized just prior to an election, are not unknown.

²⁸ See *Lash v. Nighosian*, 273 F.2d 185, 187-88 (1st Cir. 1959), cert. denied, 362 U.S. 904 (1960) (here, one of the purposes in issuing the summons to the taxpayer was to investigate conduct of revenue agents) and *Boren v. Tucker*, 239 F.2d 767, 772-73 (9th Cir. 1957) (here, the government's purpose included the securing of evidence for a criminal prosecution). The authorized purposes of tax investigation do not include either of the secondary objectives pursued in these cases. Int. Rev. Code of 1954, § 7602. Compare *United States v. Powell*, supra note 10, at 58, and *United States v. O'Connor*, 118 F. Supp. 248 (D. Mass. 1953). In *O'Connor* the court refused to enforce a subpoena where the special agent admitted that one of the purposes was "to further a criminal prosecution for which he has no official responsibility," that there was no matter of taxpayer's liability pending before him, and that he had already completed the report on taxpayer which had been requested by his superior officer. Id. at 250.

It is also interesting to note that the IRS, in a booklet entitled *Careers*, has described the special agent as one who "will make investigations of suspected and alleged tax fraud and other related criminal violations." (Emphasis added.) I.R.S. Doc. No. 5282 (rev. 10-63) 14 (1963).

²⁹ As of June 22, 1964, there were 31 Tax Administration Agreements providing for mutual exchanges of information for tax enforcement purposes between the IRS and state governments. 1964 Int. Rev. Bull. No. 25, at 73.

See generally, as to inspection of tax returns, Int. Rev. Code of 1954, § 6103; Treas. Reg. § 301.6103(a)-1—(f)-1 (1961); CCH 1964 Stand. Fed. Tax Rep. ¶¶ 5207-5209.60. Of special interest are executive orders which give the House Committee on Un-American Activities the right to inspect tax returns. See, e.g., Exec. Order No. 11109, 28 Fed. Reg. 5351 (1963). Other similar orders are listed in CCH 1964 Stand. Fed. Tax Rep. ¶ 5204.11.

Limitations upon the authority of revenue personnel to divulge information disclosed in tax returns or to permit examination of returns, where such authority is not provided by law, are set forth in Int. Rev. Code of 1954, § 7213. Criminal sanctions are provided for violations of this section. However, the Supreme Court has stated, in *Blair v. Oesterlein Mach. Co.*, 275 U.S. 225, 227 (1927), that these limitations "cannot be deemed to forbid disclosures made in obedience to process lawfully issued in a judicial or quasi-judicial proceeding. . . ."

18 U.S.C. § 1905 (1958) makes it a crime for an officer or employee of the United States to disclose, divulge or publish the sort of information that might come to the attention of a revenue agent conducting a tax investigation to the extent that such disclosure is "not authorized by law." The annotations to this code section are revealing in that they do not include any cases involving violations by officers or employees of the IRS.

³⁰ Cf. United States Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 406, Table 542 (1964); Statement of Organization and Functions, 1961-2 Cum. Bull. 483.

As to the delegation of investigatory power see text at Pt. V(B)(1), infra, and *Beatty v. United States*, 227 F.2d 350 (8th Cir. 1955).

See also Application of House, 144 F. Supp. 95, 103 (N.D. Cal. 1956) ("The field of taxation represents probably the greatest single area of contact between individuals

Thirdly, the use by the IRS of modern technological devices such as automatic data processing has made the collection and collation of the information extraordinarily efficient.³¹ Such data, therefore, becomes correspondingly more efficient for whatever authorized or unauthorized purpose it may be used.

Lastly, it is probably fair to assume that agents of the IRS, in the popular perspective, are thought to be relatively innocuous: most citizens, at least the uninitiated, are likely to think of them somewhat indifferently, perhaps as petty bureaucrats.³² Mention of the IRS does not conjure up the almost glamorous, secretive importance of the FBI, nor the awesome dignity of the grand jury with its closed proceedings. It is for this reason that investigations performed by the Service generally go unpublicized and unnoticed. The abuses which occur are ordinarily treated as the private concern of the aggrieved individuals, and hardly as a general problem for the entire society.

But surely, if there exists any danger that government will someday seek the prerogatives of a "Big Brother" in order to maintain surveillance over the everyday business, financial, and economic activities of its citizens—perhaps for the purpose of harassing the nonconformists and the dissenters—the threat may come from a large, powerful and efficient agency which has access to the financial papers and records of all people, and is accepted by most as, at worst, a slight nuisance or necessary evil. Such an agency could expand its examinations and its improper functions gradually, without giving any sudden cause for alarm. It would seem that there is no other existing agency which fits the bill as well as the IRS.

Of course, it would be a gross exaggeration to characterize the Service, as it functions today, as the all-seeing governmental clearing house described above. Aside from self-restraint, however, only judicial control or legislative action can prevent the Service from developing into such an agency. As to the effectiveness of self-restraint, the reliable chestnut about the corrupting influence of power offers little hope. To those doubters who cannot imagine such a development it may

and the force of the state.") and Rogge, *Inquisition by Officials: A Study of Due Process Requirements in Administrative Investigations—I*, 47 Minn. L. Rev. 939, 964-70 (1963) ("The agency that has the oldest investigative subpoena powers, the most varied as well as the most severe enforcement procedures and probably has issued the greatest number of such subpoenas is the Internal Revenue Service." *Id.* at 964.)

³¹ See Caplin, *Taxpayer-Identifying Number System: The Key to Modern Tax Administration*, 49 A.B.A.J. 1161 (1963); Engquist, *Improved Statistics Resulting from the ADP System*, 41 Taxes 39 (1963); Leibowitz, *Use of Taxpayer Identifying Numbers by Individuals, Business and the Government*, 41 Taxes 31 (1963); Smith, *Automatic Data Processing in the Internal Revenue Service*, 41 Taxes 26 (1963); Surrey, *Automatic Data Processing and Tax Administration: The Potentialities of ADP*, 17 Tax L. Rev. 165 (1961).

Cf., as to identifying numbers, Int. Rev. Code of 1954, §§ 6109, 6676.

³² But see Wilson, *supra* note 27, at 101.

be replied that it requires more optimism than this writer can muster to suggest that conditions—the same conditions which have nurtured the growth of the most pernicious forms of political extremism—are not present which could turn risk into reality.³³

In federal tax investigations, therefore, it is not only the private interest of a particular individual or group to be free from harassment which must be placed on the scale, as may be the case with other, more specialized, agencies.³⁴ Rather, it is *the collective private interest of all citizens in keeping potentially enormous investigative power within bounds* which is to be considered.³⁵

³³ Others have also expressed concern about the potential expansion of power. See, e.g., Packard, *The Naked Society* 42 (1964):

If information is power, Americans should be uneasy about the amount of information the federal government is starting to file in its memory banks. There are, for example, the gigantic memory machines which the Internal Revenue Service is starting to use to check data from our tax returns against data accumulated about us from other sources, such as employers and banks. The computers also watch for unlikely patterns. Obviously these memory banks are useful tools for fair and efficient tax collecting. But what are the implications for two decades from now, in 1984? If future bureaucrats choose, they can build up so-called "cum," or cumulative, files on each taxpayer over decades, and thus will have, instantly recallable, a vast amount of personal information about the living habits of every adult in the nation.

See also Reich, *Mr. Justice Black and the Living Constitution*, 76 Harv. L. Rev. 673, 746 (1963): "Bureaucracy, a predominant underlying force in the executive branch, is characterized by its need steadily to increase its own powers; it seems intrinsically incapable of imposing limits, constitutional or otherwise, on itself."

The Supreme Court, too, has recognized and, on occasion, dealt with the danger of expanding governmental investigating power. In *Boyd v. United States*, supra note 3, at 635, the decision which is the foundation of constitutional limitations on investigative power, the Court said:

Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

³⁴ See, e.g., *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 203 n.30, 213 (1946).

³⁵ See Reich, supra note 33, at 739-40; Application of House, supra note 30, at 103 ("A slight invasion of the right against self-incrimination in this field [tax investigations] has as great and baleful consequences upon the relations between the individual and the state as does an invasion of that right in the more dramatic areas of public life.")

However, not every aspect of revenue investigations involves this larger interest. Thus when taxpayer raised the physician-patient privilege in *In re Albert Lindley Lee Memorial*

To be fair, however, it must be conceded that the expansion of the IRS into a clearing house for information might be useful and efficient from the point of view of governmental administration.³⁶ This, however, merely adds another grain to the already heavily weighted public interest side of the scale.

The problem, therefore, resolves itself into a conflict between competing interests which is similar in characteristics and importance to other controversies now being resolved in our society, *e.g.*, private property versus civil rights, and enforcement of the criminal law versus civil liberties. But it has already been demonstrated that it is not necessary to sacrifice, or even to threaten, all the interests on one side of a controversy in order to resolve it. The institution of private property still stands, notwithstanding the passage of the civil rights acts, and the enforcement of the criminal laws continues despite decisions such as *Mapp v. Ohio*. Similarly, with regard to tax investigations, the goal must be to achieve an accommodation which will maximize all of the interdependent values without sacrificing any one of them. It thus becomes necessary to conduct a fairly detailed examination of current practices as a first step in framing such an accommodation.

III. DECISIONAL TRENDS

Decisions which affect the intelligence-gathering functions of administrative agencies are not made only by courts. The Congress, in deciding to grant investigative power; the agencies, in framing policies and regulations designed to fill the gaps in broadly phrased legislation; and even minor officials, in deciding to invoke investigative powers in particular situations, are also engaging in decisional processes. It is only through examination of the totality of the decisions which are the outcome of these processes that we can determine whether the sought-after accommodation between competing policies is actually being achieved.

The assumption has already been made, however, that self-restraint on the part of the officials of the agency in question cannot be depended upon to provide permanently effective limitations on investigative power. Thus, the fact that the IRS is currently imposing reasonable restrictions upon its own decisions to invoke its investigative powers and is not even using all the coercive strategies and inquisitorial

Hosp., 209 F.2d 122 (2d Cir. 1953), the court was probably correct in replying: "The public interest in the collection of taxes owing by a taxpayer outweighs the private interest of the patient to avoid embarrassment resulting from being required to give the revenue agent information as to fees paid the attending physician." *Id.* at 124.

³⁶ Professor Meltzer has referred to the use by agency A of information gathered by agency B as "sensible governmental cooperation." Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 718 (1951).

instruments available to it,³⁷ while laudable, is irrelevant to the longer-range purposes of this article.

The decisions to be examined, therefore, are those which control the outer limits of the exercise of inquisitorial power by agency officials. These decisions and the trends they indicate must first be examined for the limitations they actually impose rather than for the limitations they might be held to impose, given a liberal interpretation by a decision-maker disposed to restraining investigative power.

Since all of the decisions in this area are controlled, ultimately, by constitutional policy, and since the Supreme Court is the final arbiter of that policy, the leading decisions of that Court will be examined first.

A. *The Supreme Court*

There seems to be general agreement that the approach of the Supreme Court toward administrative investigations has changed rather radically from the one of strict control and narrow limitation of power, enunciated as late as 1936,³⁸ to the one of expansive and practically uncontrolled permissiveness thereafter.³⁹ A few leading decisions can be marshalled to support this observation. Although some of them have received extensive comment elsewhere,⁴⁰ it will be useful to describe them briefly here.

³⁷ Such as the "required records" doctrine, *Shapiro v. United States*, 335 U.S. 1 (1948). Cf. *Mortenson*, Federal Tax Fraud Law § 58 (1958).

³⁸ E.g., *Jones v. SEC*, 298 U.S. 1 (1936).

³⁹ See *Cooper*, Federal Agency Investigations: Requirements for the Production of Documents, 60 Mich. L. Rev. 187, 197 (1961); *Davis*, The Administrative Power of Investigation, 56 Yale L.J. 1111 (1947); Note, 49 Mich. L. Rev. 436 (1951).

The pendulum may be swinging back toward increased judicial control. See, e.g., *United States v. Powell*, supra note 10 and *Reisman v. Caplin*, 375 U.S. 440 (1964).

⁴⁰ See *Davis*, supra note 8, at 159; *Benton*, Administrative Subpoena Enforcement, 41 Texas L. Rev. 874 (1963); *Cooper*, supra note 39; *Meltzer*, supra note 36; *Murchison*, Rights of Persons Compelled to Appear in Federal Agency Investigational Hearings, 62 Mich. L. Rev. 485 (1964); *Newman*, Due Process, Investigations and Civil Rights, 8 U.C.L.A. L. Rev. 735 (1961); *Newman*, Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness, 60 Mich. L. Rev. 169 (1961); *Redlich*, Searches, Seizures, and Self-Incrimination in Tax Cases, 10 Tax L. Rev. 191 (1954); *Sherwood*, The Enforcement of Administrative Subpoenas, 44 Colum. L. Rev. 531 (1944); Note, Discovery in Federal Administrative Proceedings, 16 Stan. L. Rev. 1035 (1964); Note, Enforcement of the Administrative Subpoena: An Abdication of Judicial Inquiry, 27 Albany L. Rev. 239 (1962); Note, Resisting Enforcement of Administrative Subpoenas *Duces Tecum*: Another Look at *CAB v. Hermann*, 69 Yale L.J. 131 (1959); Note, Rights of the Taxpayer to Withhold Records During a Tax Investigation, 42 B.U.L. Rev. 227 (1962).

For earlier discussions of constitutional limitations on congressional or administrative agency investigative power see *Handler*, The Constitutionality of Investigations by the FTC, 28 Colum. L. Rev. 905 (1928); *Landis*, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926); *Lilienthal*, The Power of Governmental Agencies to Compel Testimony, 39 Harv. L. Rev. 694 (1926); *MacChesney & Murphy*, Investigatory and Enforcement Powers of the Federal Trade Commission, 8 Geo. Wash. L. Rev. 581 (1940).

1. The Fourth Amendment⁴¹

In *United States v. Powell*,⁴² the Court, while holding that probable cause to suspect a violation of the revenue laws need not be shown as a prerequisite to judicial enforcement of an IRS summons for books and records, did not dwell on the prohibitions contained in the Fourth Amendment: the opinions, majority and dissenting, are in fact devoid of any direct references to constitutional requirements. Nonetheless, the Court reinforced its view that the applicable statutes did not require a showing of probable cause by referring to earlier decisions, involving other agencies, in which similar claims to limit agency power were based on the Fourth Amendment. These decisions, *Oklahoma Press Pub. Co. v. Walling*⁴³ and *United States v. Morton Salt Co.*,⁴⁴ plus one prior case, *Endicott Johnson Corp. v. Perkins*,⁴⁵ constitute a trilogy which marked the reversal of the earlier, restrictive trend by diluting, if not abolishing, the requirement of probable cause as a condition to the enforcement of an administrative subpoena.

In *Endicott Johnson Corp.*, the Secretary of Labor issued a subpoena calling for payroll records from certain of petitioner's plants in order to determine whether petitioner had violated the minimum wage provisions of the Walsh-Healey Public Contracts Act.⁴⁶ She alleged that it had appeared to her, on the basis of her investigation, that petitioner had violated the statute and that she had "reason to believe" that employees in those plants were covered by it. However, she alleged no facts which would justify the court's finding of probable cause to believe either that the plants in question were covered by the act or that a violation existed. The district court refused to enforce the subpoena on the ground that the Secretary had not determined that the act covered the plants under investigation prior to her investigation for underpayments and that, in any event, it was up to the court to determine the question of coverage.⁴⁷ The circuit court reversed⁴⁸ and

⁴¹ The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

For the historical background of the Fourth Amendment see Lasson, *The History and Development of the Fourth Amendment* (1937).

⁴² Supra note 10.

⁴³ Supra note 34.

⁴⁴ 338 U.S. 632 (1950).

⁴⁵ 317 U.S. 501 (1943).

⁴⁶ 49 Stat. 2036 (1936), as amended, 41 U.S.C. §§ 35-45 (1958).

⁴⁷ *Perkins v. Endicott Johnson Corp.*, 40 F. Supp. 254 (N.D.N.Y. 1941); *Perkins v. Endicott Johnson Corp.*, 37 F. Supp. 604 (N.D.N.Y. 1941).

⁴⁸ *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208 (2d Cir. 1942). In his opinion Judge Frank recognized the change in judicial attitudes toward more effective powers for

the Supreme Court affirmed the reversal, holding that the district court could not undertake to make its own determination of coverage or to condition its enforcement of the summons on a prior determination of coverage. Rather, the Secretary had the power to ferret out payroll information from the plants under investigation in order to find underpayments which might violate the act even before she had established that those plants were in fact covered by the act.

Any doubt that *Endicott Johnson Corp.* was generally applicable to investigations by other administrative agencies, and not just a ruling peculiar to the Walsh-Healey Act, was set to rest three years later in *Oklahoma Press*. There, the Court upheld the enforcement of a subpoena duces tecum issued by the Administrator of the Wage and Hour Division of the Department of Labor seeking to enforce the Fair Labor Standards Act.⁴⁹ The subpoena was directed to a newspaper corporation and called for the production of corporate records. In seeking its enforcement the Administrator had set forth only conclusory allegations asserting his belief that the act in question covered the corporation and that the corporation had violated the act. The now famous decision is the Court's exegesis of the effect of the Fourth Amendment on agency subpoenas directed to business corporations. Mr. Justice Rutledge, writing for the Court, noted that a court order enforcing an agency summons demanding the production of books and records constitutes, at most, a constructive or figurative search and seizure.⁵⁰ It must not be confused with an actual search and seizure of a man's home or with a physical taking and carrying away of papers from a place of business. If the Fourth Amendment applies at all, it merely requires "that the disclosure sought shall not be unreasonable;" there must not be "too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant."⁵¹ As for the requirement of "probable cause," it "is satisfied . . . by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry."⁵²

Four years later, in *Morton Salt*, the Court had occasion to reaffirm the principles laid down in *Oklahoma Press* and to expand their scope. The Federal Trade Commission had ordered Morton Salt Company, a corporation, and a number of other salt producers, plus a trade association, to cease and desist from engaging in certain pricing, pro-

administrative agencies. *Id.* at 216-17. He also relied heavily upon his belief that the administrator, as a specialist, has a "trained intuition." *Id.* at 221.

⁴⁹ 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-19 (1958).

⁵⁰ *Oklahoma Press Pub. Co. v. Walling*, *supra* note 34, at 202.

⁵¹ *Id.* at 208.

⁵² *Id.* at 209, 216.

ducing and marketing practices. The order was affirmed by the court of appeals with modifications, and the respondents were ordered to comply with the order as modified.⁵³ The decree contemplated that the FTC could initiate contempt proceedings should the respondents violate it. A few years later, the FTC issued an order directing the respondents to file highly particularized periodic reports designed to assist the Commission in determining whether respondents were complying with the decree. The Commission secured neither court approval nor a modification of the decree to authorize such reports, but purported to act within the authority of the Federal Trade Commission Act.⁵⁴ The Morton Salt Company and another producer refused to comply with the FTC order, and their position was vindicated by the district court⁵⁵ and the court of appeals.⁵⁶ In the Supreme Court, the respondents argued, among other things, that the detailed demand for information violated their rights under the Fourth Amendment and under the due process clause of the Fifth Amendment. Here, then, was a case in which an administrative agency appeared to be fishing for detailed information without a license; there was not even the conclusory allegation of a reason to suspect a violation which was present in the *Endicott Johnson* and *Oklahoma Press* cases. Nonetheless, in language even broader than that used in *Oklahoma Press*, the Court swept aside respondents' arguments and reversed. The Court assumed, for the purpose of argument, that the FTC was "engaged in a mere 'fishing expedition' to see if it can turn up evidence of guilt."⁵⁷ It then went on to state that the investigative powers of the FTC are much broader than those possessed by courts, which are limited to the adjudication of cases and controversies. Rather, they are similar to those held by a grand jury, which "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."⁵⁸

In the *Powell* case the Court quoted approvingly from *Oklahoma Press* and *Morton Salt*, adopting the "legitimate purpose"—"relevance" test for probable cause⁵⁹ as well as the grand jury analogy.⁶⁰

As to the procedure to be followed by the summons-enforcing

⁵³ Salt Producers Ass'n v. FTC, 134 F.2d 354 (7th Cir. 1943).

⁵⁴ 38 Stat. 721 (1914), 15 U.S.C. §§ 46(a), 46(b) (1958).

⁵⁵ United States v. Morton Salt Co., 80 F. Supp. 419 (N.D. Ill. 1948).

⁵⁶ United States v. Morton Salt Co., 174 F.2d 703 (7th Cir. 1949).

⁵⁷ United States v. Morton Salt Co., supra note 44, at 641.

⁵⁸ Id. at 642.

⁵⁹ United States v. Powell, 379 U.S. 48 (1964):

He [the Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required in the Code have been followed. . . .

Id. at 57.

⁶⁰ Id. at 57.

judge in applying even the minimal Fourth Amendment standards which are now applicable through *Powell* to tax investigations, the leading case has been *CAB v. Hermann*.⁶¹ There, the Civil Aeronautics Board, engaged in an investigation of violations of the Civil Aeronautics Act⁶² and of its own regulations, had issued subpoenas duces tecum to individuals and entities who were connected with the airline in question, and thus subject to the Board's control. The subpoenas had called for a wide variety of documents in the most general terms. The parties objected on the ground, *inter alia*, that the "subpoenas were vague, excessively broad in scope, and oppressive."⁶³ The district court took the view that it need only compare the demand in the subpoena with the authorized purpose of the investigation. Since the documents and records requested did not seem to be obviously irrelevant or immaterial to such purpose, an order enforcing the summons was entered. The court of appeals reversed,⁶⁴ establishing a detailed procedure whereby the court would be required to determine the relevance and materiality of each document demanded before ordering compliance. The Supreme Court, in a brief per curiam opinion, reinstated the district court's order, expressing disapproval of the procedure required by Judge Fee in his opinion in the court of appeals, and tacitly sanctioning the non-critical approach adopted by the district judge. The Court then noted, almost as an afterthought, that should respondents wish to object to the relevance or materiality of any of the documents subpoenaed, they could raise their objections when the documents were offered in evidence at the hearing on the alleged violations.⁶⁵

In *Powell*, however, and in *Reisman v. Caplin*,⁶⁶ another recent decision involving federal tax investigations, the Court may have stepped back somewhat from the policy of judicial abnegation which seems to be reflected in *CAB v. Hermann*. In the *Reisman* case, taxpayers' attorneys brought an action against the Commissioner of Internal Revenue for a declaratory judgment and for injunctive relief against the enforcement of an Internal Revenue summons directed to accountants hired by them. They claimed the summons unlawfully appropriated their own work product and violated, *inter alia*, their clients' Fourth and Fifth Amendment rights. The Court affirmed a dismissal of the complaint on the ground that the petitioners had an adequate remedy at law: the right to raise their objections before the revenue officer or before a district judge or commissioner in a proceeding to enforce the summons. Such a proceeding, the Court held, "would be an adversary

⁶¹ 353 U.S. 322 (1957).

⁶² 52 Stat. 973 (1938).

⁶³ *CAB v. Hermann*, supra note 61, at 323.

⁶⁴ 237 F.2d 359 (9th Cir. 1956).

⁶⁵ *CAB v. Hermann*, supra note 61, at 324.

⁶⁶ Supra note 39.

proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness."⁶⁷ In addition, such challenges could be based "on any appropriate ground," and third parties and the taxpayer could intervene to protect their own interests.⁶⁸

In *Powell* the Court reinforced the position taken in *Reisman*. Basing his reasoning on the power of a court to prevent an abuse of its own processes,⁶⁹ Mr. Justice Harlan stated: "Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation."⁷⁰ He added, however, that the burden of establishing an abuse is on the taxpayer.⁷¹

It would seem to follow that if these newly affirmed rights of the aggrieved parties to raise their objections to improprieties in the investigation are not to be rendered meaningless,⁷² then the enforcing court, in passing upon objections to the summons, must be required to do something more than merely examine the face of the summons to determine whether there is any ostensible authorized purpose or whether the documents called for appear to be relevant, as would seem to be permitted by *CAB v. Hermann*.⁷³ Otherwise, such a minimal standard of judicial control would hardly give "complete protection" to parties affected by the summons.

2. The Privilege Against Self-Incrimination⁷⁴

The decision in *Shapiro v. United States*⁷⁵ has given rise to widespread speculation regarding the availability of the Fifth Amendment privilege against self-incrimination to individuals summoned to produce

⁶⁷ Id. at 446.

⁶⁸ Id. at 449.

⁶⁹ The Court cited Professor Jaffe's article, *The Judicial Enforcement of Administrative Orders*, 76 Harv. L. Rev. 865 (1963), where the author takes the view that in enforcing administrative orders a court has both the responsibility and the competence to do justice. Thus, he argues, "a court should rarely be required . . . to participate actively in the enforcement of a judgment which it finds offensive," and may avoid doing so by characterizing the agency's order as beyond the statutory authority or, in some cases, as an abuse of discretion. Id. at 869.

⁷⁰ *United States v. Powell*, supra note 59, at 58.

⁷¹ Ibid.

⁷² The Court in *Powell* expressed the view that the adversary hearing at which objections to enforcement of the summons can be raised is not "meaningless." Ibid.

⁷³ If the decision in *Hermann* is given a narrow construction, rather than the broad interpretation suggested here, it can be made to accommodate the stepped-up protection called for in *Powell* and *Reisman*. See Note, *Resisting Enforcement of Administrative Subpoenas Duces Tecum: Another Look at CAB v. Hermann*, supra note 40.

⁷⁴ "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V.

See generally Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949); Redlich, supra note 40.

⁷⁵ Supra note 37.

books, records and documents for examination by agents of the IRS.⁷⁶ Petitioner was an individual licensed under the Emergency Price Control Act⁷⁷ to sell fruit and produce at wholesale. A provision of the act empowered the Administrator to require licensees to keep detailed records relating to the conduct of their business.⁷⁸ Pursuant to this section regulations had been adopted requiring licensees such as petitioner to keep detailed records of their business activities.⁷⁹ Another provision of the statute offered immunity from prosecution in exchange for compelled production of books, records and documents as well as for compelled testimony.⁸⁰ The records which petitioner was required to keep were summoned by the Administrator in an investigation of possible violations. The petitioner turned over the records, acting on the belief, hardly warranted by the Administrator's comments, that he would be immune from prosecution. Subsequently, however, he was prosecuted for violating the act. He entered a plea in bar claiming immunity from prosecution, but it was overruled and a conviction followed. His conviction was then affirmed by the court of appeals⁸¹ and by the Supreme Court.⁸² Chief Justice Vinson, writing for a closely divided Court,⁸³ held that the immunity statute applied only to compelled production of books and records which were protected by the privilege against self-incrimination. Since the records in question were required by law to be kept, they were quasi-public records. The Court then ruled that the privilege against self-incrimination cannot be claimed as to such records, irrespective of the fact that their owner and possessor is an individual acting in his personal capacity.

3. Due Process⁸⁴

In *Hannah v. Larche*,⁸⁵ the Supreme Court gave short shrift to claims of procedural due process under the Fifth Amendment. There,

⁷⁶ Compare Meltzer, *supra* note 36, at 715-19, with Redlich, *supra* note 40, at 192-95.

⁷⁷ Emergency Price Control Act, ch. 26, 56 Stat. 23 (1942).

⁷⁸ Emergency Price Control Act, ch. 26, § 202, 56 Stat. 30 (1942).

⁷⁹ 8 Fed. Reg. 9546, 9548-49 (1943).

⁸⁰ Emergency Price Control Act, ch. 26, § 202(g), 56 Stat. 30 (1942).

⁸¹ *United States v. Shapiro*, 159 F.2d 890 (2d Cir. 1947).

⁸² *Shapiro v. United States*, *supra* note 37.

⁸³ Justices Frankfurter, Jackson, Murphy and Rutledge dissented.

⁸⁴ "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. Const. amend. V.

Also relevant to this discussion is the right to counsel provided by the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

See generally Newman, *supra* note 40; Rogge, *supra* note 30 (Pt. I); Pt. II, 48 Minn. L. Rev. 557 (1964).

⁸⁵ 363 U.S. 420 (1960).

the respondents were voting registrars and private citizens summoned to appear and testify before the Civil Rights Commission in an investigation of alleged deprivations of Negroes' voting rights. They attacked the validity of rules of procedure, adopted by the Commission, which denied to persons summoned to testify before it rights of appraisal, confrontation and cross-examination. After finding that Congress had authorized the Commission to adopt such rules, the Court sustained their validity. Chief Justice Warren stated: "[T]he purely investigative nature of the Commission's proceedings, the burden that the claimed rights would place upon those proceedings, and the traditional procedure of investigating agencies in general, leads [*sic*] us to conclude that the Commission's Rules of Procedure comport with the requirements of due process."⁸⁶

B. Congress

Mr. Justice Holmes' famous opinion in *FTC v. American Tobacco Co.*⁸⁷ recorded the Supreme Court's unwillingness to find a relaxation of the traditional right to be free from administrative fishing expeditions into private papers in the absence of a clear mandate to do so from Congress in "the most explicit language."⁸⁸ In *Oklahoma Press* the Court carefully examined the statutory authority and found that the Administrator of the Fair Labor Standards Act (hereinafter FLSA), in investigating without first establishing probable cause to believe a violation existed, was acting in accordance with "the most explicit language" of Congress.⁸⁹ However, section 11(a) of the act, which authorized the Administrator to gather data and conduct such investigations "as he may deem necessary or appropriate to determine whether any person has violated any provision of this Chapter,"⁹⁰ did not in terms abrogate the requirement that probable cause to suspect a violation of the act be shown prior to enforcement of a subpoena.⁹¹

⁸⁶ Id. at 451.

The Court also rejected respondents' claims that their Sixth Amendment rights were violated:

Although the respondents contend that the procedures adopted by the Commission also violate their rights under the Sixth Amendment, their claim does not merit extensive discussion. That Amendment is specifically limited to "criminal prosecutions," and the proceedings of the Commission clearly do not fall within that category. Id. at 440 n.16.

⁸⁷ 264 U.S. 298 (1924).

⁸⁸ Id. at 305-06.

⁸⁹ *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 201 (1946).

⁹⁰ 52 Stat. 1066 (1938), as amended, 29 U.S.C. § 211 (1958).

⁹¹ Similarly broad language was contained in the FTC Act which was construed in the *American Tobacco* case. After directing the Commission to prevent the use of unfair methods of competition in commerce, § 6 of the Act gave the Commission power:

(a) to gather information concerning, and to investigate the business, conduct, practices and management of any corporation engaged in commerce,

Furthermore, section 9 of the act⁹² expressly adopted Section 9 of the FTC Act⁹³ authorizing the district courts to enforce subpoenas calling for the production of "documentary evidence"; this is language identical to that which Mr. Justice Holmes had found too wanting in explicitness to justify a fishing expedition in the *American Tobacco* case.

Similarly, the determinations in both *Oklahoma Press* and *Endicott Johnson* relative to the question of coverage—that the Administrator need not show probable cause to believe the summoned party is covered by the act before the subpoena will be enforced—were not warranted by explicit statutory language in either case. On the contrary, Section 11(a) of the FLSA expressly limited the Administrator's rights to investigate to "any industry subject to this Chapter,"⁹⁴ and Section 6(a) of the FTC Act only authorized investigations "of any corporation engaged in commerce."⁹⁵

However, irrespective of the degree of explicitness of the statutory language in both cases, it can be argued that the decisions in the *Oklahoma Press* and *Morton Salt* cases upholding the constitutionality of fishing expeditions seriously undermine the foundation of Holmes' approach to the construction of statutes authorizing administrative investigations. The rule of construction which results in a refusal to attribute to Congress "an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law" in the absence of the "most explicit language" will

except banks and common carriers, and its relation to other corporations and individuals. . . .

The presence of the phrase "as he may deem necessary or appropriate" in § 11(a) of the FLSA and its absence in § 6(a) of the FTC Act would not seem to be a sufficient basis for finding that Congress explicitly authorized judicial enforcement of subpoenas without probable cause in FLSA cases but not in cases under the FTC Act. This argument is buttressed by the fact that subpoena enforcement, as such, is treated separately in another section of the applicable statutes in both cases.

The questionable explicitness in these statutes becomes even more obvious when they are compared with other statutes which contain more explicit language. See, e.g., the Federal Aviation Act of 1958, 72 Stat. 788, 792, 49 U.S.C. §§ 1482(b), 1484(b) (1958).

⁹² 52 Stat. 1065 (1938), 29 U.S.C. § 209 (1958).

⁹³ 38 Stat. 722, 723 (1914), 15 U.S.C. §§ 49, 50 (1958).

⁹⁴ 52 Stat. 1066 (1938), 29 U.S.C. § 211(a) (1958).

⁹⁵ 38 Stat. 721 (1914), 15 U.S.C. § 46(a) (1958).

The explicitness of these statutes and the sections of the Internal Revenue Code which are examined in the next section of this article should be compared with the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 539, 29 U.S.C. § 521(a) (Supp. V, 1964), which provides:

The Secretary shall have power *when he believes it necessary* in order to determine whether any person has violated or is about to violate any provision of this chapter . . . to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons *as he may deem necessary* to enable him to determine the facts relative thereto. (Emphasis added.)

obviously become inapplicable if the statute in question does not raise serious constitutional questions.⁹⁶

One may conclude, therefore, that apart from possible restraints which may be imposed by an enforcing court to prevent abuses of its own processes, a general statutory grant of broad investigatory power to an agency for the purpose of enforcing the act administered by it need not be construed narrowly to limit the agency's freedom of action.

Nonetheless, it becomes relevant to inquire into the statutory scheme for revenue investigations to ascertain what restrictions, if any, Congress intended to impose.

1. The Statutory Authority

The basic authority of IRS officials to issue summonses for the production of books, papers and records and the taking of testimony is set forth in Section 7602 of the Internal Revenue Code of 1954. This section expressly limits the purposes of examinations conducted under its authority to

ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability.

Section 7603 regulates the manner in which the summons shall be served—in hand or at the last and usual place of abode of the person summoned—and requires, agreeably with *Oklahoma Press*, that books, papers, records or other data called for be described with reasonable certainty.

Other restrictions are contained in section 7605. Subsection (a) limits the time and place of examinations conducted pursuant to section 7602 by requiring that they be "reasonable under the circumstances" and that the date fixed in the summons for appearance not be less than ten days from the date of its issuance.

Section 7605(b) provides that:

No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

⁹⁶ See *Oklahoma Press Pub. Co. v. Walling*, supra note 89, at 201-14. Cf. *Frank v. Maryland*, 359 U.S. 360, 365 (1959).

There are three basic methods provided in the Code for enforcing such investigatory powers as are granted: section 7210 makes neglect to appear or to produce summoned records after having been duly summoned by a revenue officer authorized to issue such summons a crime punishable by a fine of not more than \$1,000, or by imprisonment of not more than one year. Under section 7604(b) the Service is empowered to apply to a district judge or United States Commissioner for an attachment "as for contempt" against a witness who neglects or refuses to obey a summons. Upon a showing of "satisfactory proof," the contumacious witness may then be arrested and brought in for a hearing. At the hearing the judge or commissioner has power "not inconsistent with the law of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

The mildest enforcement procedure, and the one which is most readily available to the IRS, is the bringing of an action in the federal district court where the summoned party resides or may be found for an order compelling him to comply with the summons. Jurisdiction to compel compliance "by appropriate process" is granted to the district court by the terms of sections 7402(b) and 7604(a), which are identical, and section 7402(a).

2. Statutory Interpretation

At the outset, it should be noted that the investigative power granted by the Code under the sections described above seems to be limited by section 7602 to matters relating primarily to civil liability. Although the correctness of a return, the failure to make a return, and the amount of tax liability may all be relevant in criminal tax prosecutions, the assumption has been that this section may not be used by officials engaged in investigations of criminal tax liability.⁹⁷ Apparently this assumption is correct, since in *Reisman v. Caplin* the Supreme Court held that one of the "appropriate grounds" for challenging a revenue summons was that it was issued for the improper purpose of gathering evidence for a criminal prosecution.⁹⁸

There are other questions which the language of the Code does not purport to answer. What showing, if any, must the investigating official make in order to have his summons enforced? The first clause in section 7605(b) generally prohibits unnecessary examinations, but does not indicate what constitutes "necessity." The second clause deals

⁹⁷ *United States v. O'Connor*, 118 F. Supp. 248 (D. Mass. 1953). See *Burns, Searches and Seizures: The Suppression of Evidence*, 20 Inst. Fed. Tax (N.Y.U.) 1081, 1087-89 (1962).

⁹⁸ *Supra* note 39, at 449. But compare *Boren v. Tucker*, 239 F.2d 767, 772 (9th Cir. 1956), cited by the Court.

only with situations in which the taxpayer's books have already been subjected to one inspection and another is sought. It requires that the Service, after investigation, give the taxpayer written notice that another inspection is necessary. But here again there is no indication whether the Service, if challenged, must prove either that the re-examination is necessary or that it has in fact conducted a preliminary investigation. Furthermore, it has never been clear whether this section is applicable only when the taxpayer himself has been summoned, or whether it imposes general limitations on the Service which apply alike to investigations of taxpayers and third parties.⁹⁹

In the *Powell* and *Reisman* cases the Supreme Court resolved some of these problems but raised others. Reviewing the legislative history of section 7605(b), the *Powell* Court concluded that the purpose of Congress was merely to curb the investigatory powers of "low-echelon revenue agents . . . by requiring such agents to clear any repetitive examinations with a superior."¹⁰⁰ It is difficult to see how the language of that section could accomplish this purpose, since there is nothing to prevent the Secretary of the Treasury from delegating the power to notify the taxpayer directly to the "low-echelon official." Nonetheless, the Court's conclusions follow directly from its interpretation of the legislative intent. The prohibition against unnecessary examinations does not require a showing of probable cause to suspect fraud even though the tax years under investigation are closed to assessment except for fraud,¹⁰¹ and an examination is necessary if the Service cannot determine the existence or non-existence of fraud from information already within its possession.¹⁰² And legislative intent aside, to require a showing of probable cause "might seriously hamper the Commissioner in carrying out investigations he thinks warranted,

⁹⁹ Compare *Hubner v. Tucker*, 245 F.2d 35, 38-39 (9th Cir. 1957) (summoned party not entitled to written notice of necessity of second examination where purpose of examination is not to determine her personal tax liability; such third parties "have rights of their own") with *Martin v. Chandis Sec. Co.*, 128 F.2d 731, 735 (9th Cir. 1942) (section of Internal Revenue Code prohibiting unnecessary examinations constitutes "a limitation on the power of the Bureau" and not "merely a personal right available only to the taxpayer").

These two cases are distinguishable if the first clause of § 7605(b), prohibiting unnecessary examinations, is separable from the second clause, requiring written notice of the necessity for a re-examination. In the *Powell* case, however, the Supreme Court held that the primary purpose of the first clause "was no more than to emphasize the responsibility of agents to exercise prudent judgment in wielding the extensive powers granted to them by the Internal Revenue Code." *Supra* note 59, at 56.

¹⁰⁰ *Supra* note 59, at 55-56.

¹⁰¹ *Id.* at 56-57. The majority rejected Mr. Justice Douglas' argument in dissent (joined by Justices Stewart and Goldberg) to the effect that the three year statute of limitations on ordinary tax deficiencies is a "statute of repose" which imposes a minimum standard for administrative investigation of closed years: the Service must satisfy the enforcing court that it is not acting "capriciously" in reopening a closed year in order to overcome the presumption that such examination is unnecessary. *Id.* at 59.

¹⁰² *Id.* at 53.

forcing him to litigate and prosecute appeals on the very subject he desires to investigate.”¹⁰³

Although the *Powell* case dealt with a fraud investigation in which assessments for non-fraudulent deficiencies were barred by the statute of limitations, the Court’s rationale should apply, a fortiori, to cases in which ordinary tax liability is being investigated.

However, the Court did not remove all limitations on the Service’s investigatory power. An investigation will be deemed “unnecessary” if the Service already has within its possession information sufficient to support a determination that liability does or does not exist. Presumably, this requirement might bar investigations for the purpose of gathering information which merely duplicates information already in the hands of the Service. In addition, the administrative steps set down in sections 7603 and 7605(b) must be followed. Thus, the Service must not only properly serve the summons and, in the case of a re-examination, notify the taxpayer that another examination is necessary, but may also have to conduct an investigation of records in its possession to determine whether the examination is necessary before sending the notice.¹⁰⁴

The joker, however, is that the Court in *Powell* has placed the burden of establishing a failure to fulfill the statutory requirements as well as the burden of proving that the summons was issued for an improper purpose upon the aggrieved party.¹⁰⁵

While it may be easy to show that no “Commissioner’s letter” was sent, that the witness was not properly served, that less than ten days was provided between the date of the summons and the date required for appearance, or even that the place and time set for the examination were unreasonable, it may be extraordinarily difficult, if not impossible, to establish other objections. Assuming that the investigating agent is the least bit sophisticated, how will the summoned party prove that no investigation was conducted before the written notification of the necessity for re-examination was sent? How will he prove that the Service already has in its possession sufficient infor-

¹⁰³ Id. at 54.

¹⁰⁴ The Court held that the Commissioner

must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner’s possession, and that the administrative steps required by the Code have been followed—in particular, that the “Secretary or his delegate,” after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect. Id. at 57-58.

¹⁰⁵ “The burden of showing an abuse of the court’s process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined.” Id. at 58.

mation upon which to make its determination of liability *vel non*? And most importantly, how will he prove that the summons is issued for an improper purpose?

The answer might be that the enforcement proceedings under sections 7402(b) and 7604(a) are ordinary civil actions¹⁰⁶ in which the discovery provisions of the Federal Rules of Civil Procedure¹⁰⁷ are available.¹⁰⁸ The party resisting the summons can therefore acquire the necessary information by taking depositions of tax officials and by examining files in the possession of the IRS. Apart from possible governmental privileges,¹⁰⁹ however, there are at least two other difficulties in connection with discovery. In the first place, the free use of discovery by the summoned witness or an interested intervenor would tend to do precisely what the Supreme Court is trying to avoid: it would cause delays which might seriously hamper the Service in carrying out its investigations. Secondly, at least in the case of a claim that there was no preliminary investigation, and possibly as to the other claims, more or less conclusionary responses to interrogatories might have to be taken at face value.

But even if discovery is available, and even if it is effective in bringing out the facts upon which to base an objection, the most important question, from the aspect of "the right to be let alone," has been left unanswered by the *Reisman* and *Powell* decisions. If the objecting party should somehow manage to sustain the burden of proving that the investigation is being conducted for an improper purpose, will the court or commissioner automatically refuse to enforce the summons, or must the absence of a proper purpose also be proved?¹¹⁰ The lower federal court cases which have dealt with the matter have generally refused to enforce the summons only in cases in which a

¹⁰⁶ *United States v. Powell*, supra note 59, at 58 n.18: "Because § 7604(a) contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply, *Martin v. Chandis Securities Co.*, 128 F.2d 731."

¹⁰⁷ Fed. R. Civ. P. 26-37.

¹⁰⁸ 4 Moore, *Federal Practice* ¶¶ 26.05, 26.25 (1963); *Fusco v. Kaase Baking Co.*, 205 F. Supp. 459 (N.D. Ohio 1962).

¹⁰⁹ 8 Wigmore, *Evidence* § 2377 (McNaughton rev. 1961); *Wirtz v. Continental Fin. & Loan Co.*, 326 F.2d 561 (5th Cir. 1964); *Fusco v. Kaase Baking Co.*, supra note 108.

¹¹⁰ In *Reisman* the Court stated that the summons may be challenged "on any appropriate ground" including the defense "that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." Supra note 39, at 449. In *Powell* the Court, relying on *Reisman*, held that a summons could be challenged if it had been issued for an improper purpose "such as to harass the taxpayer or to put pressure on him to settle a collateral dispute." 379 U.S. 48, 58.

In the *Reisman* case the Court cited only *Boren v. Tucker*, supra note 98, to support its holding. In *Boren*, however, the court enforced the summons notwithstanding the fact that the investigating officer might have had as one of his purposes the uncovering of facts leading to a criminal prosecution.

proper purpose is conspicuously absent,¹¹¹ even though an improper purpose was present.¹¹² Yet, unless the IRS official seeking enforcement is naive and ingenuous, he should find it easy to make it appear that a purpose authorized by section 7602 is present.

The solution to this problem may lie in the discretionary nature of the enforcing court's right to deny enforcement as an abuse of its processes. The judge or commissioner will sense the relative importance of the improper motive in the particular case and, if he finds that such motive predominates, he may deny relief to the IRS. Under such a test the degree of relationship between the unauthorized purpose and the authorized revenue purpose would undoubtedly become relevant. If, for example, the unauthorized purpose is to find out if the taxpayer is a Communist, or if he has violated a state criminal law, then the summons would be quashed. But in the majority of cases where an incidental purpose is to uncover possible criminal violations of the tax laws, it will be enforced.

Nevertheless, in cases where the summoned party does not suspect the presence of an improper purpose or cannot prove that it exists—perhaps the very cases in which the Service's purposes would be most ignoble and in which the right of privacy is in greatest danger—the protection afforded the witness has been diminished by making it possible for the Service to examine closed years without first marshaling evidence to support a finding of probable cause.¹¹³

The availability of enforcement procedures other than by ordinary civil action has been somewhat clarified by the opinion in the *Reisman* case. Part of the justification for petitioner's claim for injunctive relief against the Commissioner was based on the assertion that failure to comply with the summons might result in a criminal prosecution and conviction under section 7210 or an arrest under section 7604(b), and that these penalties were sufficiently severe to amount to a denial of judicial review.¹¹⁴ To this the Court replied that the criminal sanction provided by section 7210 is not applicable where the witness appears and attacks the summons in good faith,¹¹⁵ and that attachment as for contempt, arrest, and punishment under section 7604(b) may be in-

¹¹¹ *United States v. O'Connor*, supra note 97.

¹¹² *In re Magnus, Mabee & Reynard, Inc.*, 311 F.2d 12 (2d Cir. 1962), cert. denied, 373 U.S. 902 (1963); *Lash v. Nighosian*, 273 F.2d 185 (1st Cir. 1959), cert. denied, 362 U.S. 904 (1960). Cf. *Bolich v. Rubel*, 67 F.2d 894 (2d Cir. 1933); *In re International Corp. Co.*, 5 F. Supp. 608 (S.D.N.Y. 1934).

¹¹³ The use of the IRS as a general fact-gathering agency is obviously inhibited if each time it seeks enforcement of a summons to examine closed years it must satisfy the court that a reasonable ground exists to suspect fraud.

¹¹⁴ See *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920) and *Ex parte Young*, 209 U.S. 123 (1908), both cited by the Court.

¹¹⁵ *Reisman v. Caplin*, supra note 39, at 447.

voked only against "persons who were summoned and wholly made default or contumaciously refused to comply."¹¹⁶

It follows, therefore, that when the summoned party entertains a good faith claim relating to the propriety of summons enforcement based upon the Constitution or upon statutory limitations, as already outlined, or upon other privileges, the only enforcement remedy available will be in the nature of a civil action under sections 7604(a) or 7402(b).

The Court also made it clear that in such an action, as well as in a case where the 7605(b) attachment procedure is utilized, the witness may attack the summons on any appropriate ground. This right will also extend to interested persons, including the taxpayer, who were not summoned. They may intervene to protect their own interests. If, after hearing objections, the enforcing court issues an order, it will be appealable.¹¹⁷

It is still not entirely clear, however, who has standing to raise what objections. In the *Powell* case the summons was addressed directly to Powell, president of the taxpayer-corporation, to testify and produce records relating to the tax liability of the corporation. Thus it was not necessary to the decision to treat the rights of third parties or non-summoned taxpayers. In *Reisman*, however, the petitioner, taxpayers' attorney, alleged that he was seeking to protect his own work product and trial preparation from unlawful appropriation, to protect his own ability to fulfill his duties as an attorney to his clients, and to protect his clients against violation of their rights and privileges.¹¹⁸ The summons itself was directed to accountants hired by petitioner to assist him in defending the taxpayers against civil and criminal tax proceedings. In its brief the government raised doubts about the ability of the summoned parties to refuse to comply with the summons, since none of their own rights were involved.¹¹⁹ But the Court did not have to deal with that problem because the accountants had indicated that they would comply with the summons. Nonetheless, the approach taken by the Court when it held that other interested parties may intervene seems to suggest that each party must raise his own rights. But who is entitled to object that the examination is for an improper purpose? The decision in *Powell* would seem to support the position that either the summoned party or anyone otherwise entitled to intervene may raise that objection. If the purpose of an investigation is improper, the court ought to be able to deny enforcement of a summons

¹¹⁶ Id. at 448. The Court noted, in dictum, that the use of attachment under § 7604(b) against a "witness who has neither defaulted nor contumaciously refused to comply would raise constitutional considerations" Id. at 448 n.8.

¹¹⁷ Id. at 449.

¹¹⁸ Brief for Petitioner, p. 3.

¹¹⁹ Brief for Respondents, pp. 10, 27.

and thus prevent an abuse of its own processes at the behest of any interested party; the problem may thus become a matter of sound judicial administration.¹²⁰

Apart from the propriety of the purpose, however, other objections which might arise under 7604(b), relating to necessity, would seem to be exclusively those of a summoned taxpayer and not available either to a summoned third party or to a taxpayer intervening in an action in which he himself was not summoned. Although it is certainly not conclusive, the legislative history of section 7604(b), quoted in *Powell*, seems to support this construction.¹²¹

IV. THE IMPLICATIONS OF THE SUPREME COURT'S TREATMENT OF ADMINISTRATIVE INVESTIGATIONS

By its decision in *Powell*, the Supreme Court has reaffirmed the judicial power to control the abuse by federal tax investigators of their enforcement powers, and has thus attempted to react against the frequent claim that the courts were nothing more than rubber stamps. It has already been suggested, however, that the Court's reading of the applicable tax statutes to provide only technical protection, coupled with its view that the objecting party bears the burden of proving that the summons ought not to be enforced, may have had precisely the opposite effect. It now remains to be seen what additional protection, if any, is provided by the major constitutional decisions described earlier.

A. *The Fourth Amendment*

There is a serious doubt, echoed in *Oklahoma Press*,¹²² whether the protection of the Fourth Amendment applies at all to the "figurative" searches and seizures engaged in by administrative investigators when the privilege of self-incrimination is not available. The opinion in the landmark case of *Boyd v. United States*¹²³ pointed out the relationship between the Fourth and Fifth Amendments, and suggested that it was the use of a man's private papers to incriminate him, in violation of the Fifth Amendment, which made the demanded production an unreasonable seizure in violation of the Fourth.¹²⁴ The requirements of this relationship have been carried over into later decisions,¹²⁵

¹²⁰ Cf. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 225 (1946); *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 393 (1944) (Mr. Justice Frankfurter, dissenting).

¹²¹ *United States v. Powell*, 379 U.S. 48, 54-55 (1964).

¹²² *Supra* note 89, at 208.

¹²³ 116 U.S. 616 (1886).

¹²⁴ *Id.* at 630, 633.

¹²⁵ *Frank v. Maryland*, *supra* note 96; *Oklahoma Press Pub. Co. v. Walling*, *supra* note 89, at 205.

In *Frank* the Court noted that the history of the Fourth Amendment showed that it was designed to prevent searches for incriminating evidence, but indicated that the protection it affords today is not necessarily restricted within historical bounds. *Supra*

although none of these have expressly involved administrative investigations. If applicable, however, the consequences would be that if no danger of self-incrimination were present, then the Fourth Amendment protections, limited as they are, would be inapplicable.

Assuming, however, that some Fourth Amendment protection is available, the essence of that protection in tax investigations is that the demand for an examination should not be unreasonable.¹²⁶ As in other situations in the law where reasonableness is the applicable standard, what is or is not reasonable cannot be answered by a litmus paper test which will give a sure result in every case. Rather, each determination must be based on the facts and circumstances of the particular case. However, by examining the leading decisions, it is possible to delineate several guidelines, of varying degrees of generality, which will aid in this determination. Thus, whether the enforcement of an agency summons calling for the production of documents will violate Fourth Amendment rights is made to depend on the answers to these five questions: (1) whether the investigation is for a purpose Congress can order;¹²⁷ (2) whether the investigation is authorized by Congress;¹²⁸ (3) whether the summoned documents are described with sufficient particularity;¹²⁹ (4) whether the documents sought are relevant and material to the investigation;¹³⁰ and (5) whether compliance with the summons will impose an unreasonable burden on the summoned party.¹³¹ Affirmative answers to questions (1) through (4) and a negative answer to question (5) will justify judicial enforcement of the summons under the Fourth Amendment, notwithstanding the absence of a specific showing of probable cause.¹³²

As to question (1), it is already beyond dispute that Congress can authorize the Service to conduct investigations for the purposes set forth in Section 7602 of the Code.¹³³ And, since it is ordinarily the

note 96, at 366. See *Stanford v. Texas*, 85 Sup. Ct. 506, 511 (1965) where the Court quotes approvingly from Mr. Justice Douglas' dissent in *Frank*.

¹²⁶ *Oklahoma Press Pub. Co. v. Walling*, supra note 89, at 208.

¹²⁷ *Id.* at 209. See *United States v. Powell*, supra note 121, at 57.

¹²⁸ *United States v. Powell*, supra note 121; *Oklahoma Press Pub. Co. v. Walling*, supra note 89, at 209.

¹²⁹ *Oklahoma Press Pub. Co. v. Walling*, supra note 89. The same requirement is imposed by statute. Int. Rev. Code of 1954, § 7603.

¹³⁰ *Oklahoma Press Pub. Co. v. Walling*, supra note 89, at 204.

¹³¹ *Id.* at 208. See *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950); *McMann v. SEC*, 87 F.2d 377, 379 (2d Cir.), cert. denied, 301 U.S. 684 (1937).

¹³² When the summons only calls for oral testimony the Fourth Amendment would not seem to apply. In any event, probable cause will be dispensed with if affirmative answers to questions (1) and (2) are given, if the testimony sought is relevant and material to the investigation, and if the other statutory requirements, enumerated in the *Powell* case, are satisfied. Supra note 121, at 57-58. See also *Application of United States (Carroll)*, 246 F.2d 762, 765 (2d Cir.), cert. denied, 355 U.S. 857 (1957), a pre-*Powell* case.

¹³³ See *United States v. First Nat'l Bank*, 295 Fed. 142 (D. Ala. 1924), aff'd mem.,

principal occupation of the agent seeking enforcement to perform these functions, nothing more than the presentation of the investigator's credentials, coupled with an easily established assertion that he is fulfilling one of the statutory purposes, will result in an affirmative answer to question (2).¹³⁴

With respect to question (3), specificity of description, the courts generally recognize that the investigating agency cannot always be expected to know which documents will shed light on the taxpayer's liability before the documents are actually examined.¹³⁵ Therefore, courts may permit the Service to throw the onus of producing all relevant documents on the person served by demanding, in general terms, all books, records and documents relating to the taxpayer's liability for specified years or to the particular transaction in question.¹³⁶ This practice would seem to meet the general standard set forth in the *Oklahoma Press* case requiring "specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry."¹³⁷ Furthermore, by virtue of *CAB v. Hermann*, it is not necessary, as some courts had suggested,¹³⁸ for the investigating agent first to interrogate witnesses to ascertain which specific documents and records shed light on the taxpayer's liability, and then to limit the subpoena duces tecum to those specific documents.¹³⁹

Whether the Service must have specific taxpayers in mind and list their names in the summons, or whether it can issue a summons to a third party and demand an examination of all books and records relating to financial transactions with any taxpayer in order to uncover unreported income or the failure to file an income tax return, is discussed below.¹⁴⁰ Suffice it to say here that a "fishing expedition" not

267 U.S. 576 (1925). The relevant parts of § 7602 are quoted in the text at Pt. III(B)(1), *supra*.

¹³⁴ *In re Keegan*, 18 F. Supp. 746, 748 (S.D.N.Y. 1937).

¹³⁵ *In re International Corp. Co.*, *supra* note 112; *Cooley v. Bergin*, 27 F.2d 930 (D. Mass. 1928). Cf. *McPhaul v. United States*, 364 U.S. 372, 382 (1960).

¹³⁶ *Falsone v. United States*, 205 F.2d 734, 736 (5th Cir.), cert. denied, 346 U.S. 864 (1953) ("All books, papers, records or memoranda in your files relating to (1) individual . . . returns [of taxpayers] . . . for the years 1940 to 1946, inclusive. (2) Corporation . . . returns of [named corporation] . . . for the years 1940 to 1951, inclusive.") See also *In re International Corp. Co.*, *supra* note 112; *Cooley v. Bergin*, *supra* note 135. Cf. *Stanford v. Texas*, *supra* note 125, at 512 n.14; *Brown v. United States*, 276 U.S. 134, 142-43 (1928); *Goldberg v. Local 299, Teamsters*, 293 F.2d 807 (6th Cir.), cert. denied, 368 U.S. 938 (1961).

¹³⁷ *Oklahoma Press Pub. Co. v. Walling*, *supra* note 89, at 209; *In re Magnus, Mabee & Reynard, Inc.*, *supra* note 112, at 17. Cf. *McPhaul v. United States*, *supra* note 135.

¹³⁸ *Hubner v. Tucker*, *supra* note 99; *Local 174, Teamsters v. United States*, 240 F.2d 387 (9th Cir. 1956); *First Nat'l Bank v. United States*, 160 F.2d 532 (5th Cir. 1947).

¹³⁹ *In re Magnus, Mabee & Reynard, Inc.*, *supra* note 112, at 17. Of course this assumes that the thrust of *Hermann* has not been limited by the *Powell* case. See text at note 66, *supra*.

¹⁴⁰ See text at notes 150-65, *infra*.

related to particular taxpayers would probably not violate the "specificity" requirement if the summons were otherwise limited to transactions for specified years and to specified types of documents. However, as will be seen,¹⁴¹ such an examination might be deemed to constitute an "unreasonable burden" if it caused the third party unusual hardship by way of expense or business disruption.

The fourth factor—relevance and materiality—merely requires a showing that the records sought might shed light on the questions which are the authorized purpose of the investigation.¹⁴² If the description of the documents is couched in general terms, such as "all records relating to the tax liability of taxpayer for 1964," then the relevance and materiality of the documents sought will be obvious from the face of the summons. But, even if the summons lists specific documents, or classes of documents, *CAB v. Hermann*, if held applicable, releases the order-enforcing judge from any duty to examine the requested documents himself; he may make the determination of relevance and materiality by reference only to the description of the documents in the summons. He is then empowered to enforce the summons, unless a connection between the requested records and the authorized tax purpose is conspicuously absent,¹⁴³ and objections to the production of particular documents included in a category of summoned records which meet the loose requirements outlined above will not be heard.¹⁴⁴ Under the circumstances one might predict that correspondence of a highly personal nature, not otherwise privileged, might be subject to examination by the Internal Revenue Service, if written to anyone with whom the witness might have had financial dealings.¹⁴⁵

The fifth factor—whether the requested examination will impose an unreasonable burden on the summoned party—is broad enough to

¹⁴¹ See text at notes 161-65, *infra*.

¹⁴² *In re International Corp. Co.*, *supra* note 112.

¹⁴³ In the trial judge's "memorandum for order" in the *Hermann* case, the judge justified the enforcement order by stating:

In laying the subpoenas along side the charges in the Complaint, this Court cannot say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant to the proceedings before the Board, without an examination of all the documents and things themselves, which this Court is not called upon to do at this state of the proceedings.

See *Hermann v. CAB*, 237 F.2d 359, 362 (9th Cir. 1956).

Of course, in the rare case where there is no apparent connection between the documents described in the summons and any authorized purpose of the investigation, the judge called upon to enforce the summons will probably have to find a connection before he issues the enforcing order.

¹⁴⁴ *CAB v. Hermann*, 353 U.S. 322 (1957). Cf. *Foster v. United States*, 265 F.2d 183 (2d Cir.), cert. denied, 360 U.S. 912 (1959).

¹⁴⁵ Indeed, in the *Hermann* case itself some of the persons whose records were summoned claimed that some of those records related solely to their personal affairs. *Hermann v. CAB*, *supra* note 143, at 361.

encompass all the prior factors. For example, it is possible to characterize an unauthorized examination, or any examination which calls for documents which are irrelevant or immaterial to any authorized purpose of the investigation, as constituting an unreasonable burden on the summoned party. However, the fifth factor also has significance independent of the other four factors. For the purposes of this discussion, therefore, it will be assumed that the requirements of those four have been met.

Two separate elements, often closely related, will determine whether a given examination constitutes an unreasonable burden. The first is disproportionality: is the requested examination out of proportion to the ends sought? The second is hardship: are the requirements of the summons unreasonably onerous? As to the former element, there are two types of disproportionality which may be the basis for holding that a proposed examination constitutes an "unreasonable burden" on the summoned party. The first type is the garden variety, where compliance with the summons may require the production of a greater quantity of documents, or may cause more inconvenience, than is necessary or even useful in fulfilling the investigation's authorized purpose.¹⁴⁶ The second type is more broadly based on the policy of the Fourth Amendment; though the purposes or ends of the requested examination be perfectly proper, the scope or breadth of the summons may be so sweeping that it resembles the prohibited general warrant.¹⁴⁷ Here the disproportionality relates not only to the purposes of the particular investigation, but also to the amount of inquisitorial power placed in the hands of the administrative agent vis-à-vis the rights of citizens in a democratic society.

Frequently, both elements will appear together. That is, the existence of disproportionality, especially of the first type, may work a real hardship by way of expense or inconvenience on the summoned party.¹⁴⁸ For discussion purposes, however, the two elements will be treated separately.

When the demand made requires the production of more documents than are necessary or useful in order to accomplish the authorized purpose, or when compliance with the summons will expose the summoned party to more inconvenience or business disruption than

¹⁴⁶ *Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450, 453 (6th Cir. 1941) (subpoenas demanding 600,000 employee cards which necessarily contained "a vast amount of irrelevant material" held to be out of proportion to the end sought.) Cf. *CAB v. Hermann*, *supra* note 144, at 323 (One of the reasons given for upholding the order enforcing the subpoenas was that it contained "appropriate provisions for assuring the minimum interference with the conduct of the business of respondents"); *United States v. United Distillers Prods. Corp.*, 156 F.2d 872 (2d Cir. 1946).

¹⁴⁷ *McMann v. SEC*, *supra* note 131. Cf. *Stanford v. Texas*, *supra* note 125; *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

¹⁴⁸ See *United States v. United Distillers Prods. Corp.*, *supra* note 146.

is necessary for the accomplishment of the authorized purpose, the enforcing judge will be justified either in refusing to enforce the summons as written, or in modifying it by enforcing only those requirements which are necessary or useful, but not excessive, in relation to the examination's authorized purpose.¹⁴⁹ However, as the scope of the examination is expanded, the demand may appear to become less excessive. Thus, the Service, by manipulating the scope or breadth of a summons issued for a purpose authorized by statute, may make it appear that the requirements of compliance are not out of proportion to the ends sought.¹⁵⁰

Of course, the following question then arises: with how much generality can the investigator state the scope or breadth of his examination? It is here that the second type of disproportionality becomes relevant. Is it possible for the Service to request an examination based only on one or more of the statutory purposes, without having particular taxpayers, particular tax years, or particular transactions in mind? In Judge Learned Hand's famous opinion in *McMann v. SEC*,¹⁵¹ it was suggested that if "the person served is required to fetch all his books at once to an exploratory investigation whose purpose and limits can be determined only as it proceeds" then the investigation would constitute a "fishing excursion" which would be "out of proportion to the end sought" and "so onerous as to constitute an unreasonable search."¹⁵² When tax summonses are tested against this standard, it can be argued that (based on the earlier assumption) the general statutory purpose is always known in advance. Thus, unless Judge Hand's test includes the unstated requirement that the *specific* purpose or *specific* limits of the investigation be known in advance, *e.g.*, that the examination is being conducted to determine the tax liability of taxpayer X, the tax liability of taxpayer X for years certain, or the tax liability of taxpayer X with respect to transaction Y, then, for all practical purposes, no tax investigations would seem to fall within its prohibition. With respect to the need to pinpoint particular transactions which are suspect, however, *Endicott Johnson*, *Oklahoma Press*, *Morton Salt*, and *Powell* hold that, at least in cases where the summoned party is under investigation as to possible statutory or rule violations on his own part, the investigating agency need have no specific transaction in mind. Fur-

¹⁴⁹ In re International Corp. Co., *supra* note 112. See *Brody v. United States*, 243 F.2d 378, 384-85 (1st Cir.), cert. denied, 354 U.S. 923 (1957); *Falsone v. United States*, *supra* note 136, at 739; *First Nat'l Bank v. United States*, *supra* note 138.

¹⁵⁰ Cf. *McPhaul v. United States*, *supra* note 135, at 382: "The Subcommittee's inquiry here was a relatively broad one . . . and the permissible scope of materials that could reasonably be sought was necessarily equally broad."

¹⁵¹ *Supra* note 131.

¹⁵² *Id.* at 379.

thermore, in the *Powell* case, the Court approved and restated the language of *Morton Salt*:

It [the administrative agency] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.¹⁵³

Carrying this analogy forward, the failure to specify a particular transaction would not seem to be fatal to summons enforcement in a third-party investigation of named taxpayers,¹⁵⁴ although, as shall be seen, the hardship feature of such an investigation may impose limitations on the scope of the inquiry which are not present if the summons is addressed directly to the taxpayer.

As to the need to specify and limit the tax years under investigation, the leading decisions shed less light. However, by applying the grand jury analogy, it may be suggested that the Internal Revenue Service can investigate any and all tax years. Therefore, even assuming that the *McMann* test would result in a refusal to enforce a summons which was not limited in terms to specific transactions or to specific tax years, as a practical matter the Service could overcome this objection simply by setting forth in the summons any years in which it had an interest.

A more difficult question is raised, however, in the case of a third-party investigation where the agency does not have named persons in mind. This might include the situation, for example, where the summons is directed to a bank demanding the opportunity to examine all of the bank's records relating to deposits and withdrawals by all customers. Hardship aside, does such an examination constitute an unreasonable "fishing excursion?" Here, unlike the prior situations, the general statutory purpose is not qualified by reference to particular taxpayers. In *McMann* and in all of the leading decisions, the investigations were limited to possible violations by particular parties; thus, these cases shed no light on the question. While language in a 1934 tax investigation case, *In re International Corp. Co.*,¹⁵⁵ seems to suggest that a third-party investigation of unnamed taxpayers would violate the Fourth Amendment, the grand jury analogy would seem to call for

¹⁵³ Supra note 131, at 642-43. Accord, *United States v. Powell*, supra note 121, at 57.

¹⁵⁴ Cf. *De Masters v. Arend*, 313 F.2d 79 (9th Cir.), appeal dismissed, 375 U.S. 936 (1963); *In re Magnus, Mabey & Reynard, Inc.*, supra note 112.

¹⁵⁵ Supra note 112, at 612. See *Hubner v. Tucker*, supra note 99, at 41.

a contrary conclusion.¹⁵⁶ Thus, it cannot be said with certainty that such examinations are proscribed. Furthermore, it is still doubtful whether the rights of the unnamed or unknown taxpayers can be asserted by the third party when his records are summoned, especially where there is no confidential relationship between the taxpayer and the summoned party.¹⁵⁷ Therefore, it may only be open to the summoned party to complain that his own rights are being infringed, and, absent a showing that the investigation works an unreasonable hardship on him, it is unlikely that he will be able to complain that the investigation is not limited to the liability of named persons. The fact that the third party would like to protect the dealings of his customers from agency scrutiny has already been held not to be a basis for denying enforcement of the summons.¹⁵⁸

Although the *McMann* prohibition against disproportionality may not provide any limitations on the Service in the ordinary situation, it may not be a dead letter. Even the *Oklahoma Press* and *Morton Salt* cases indicate that there are some limitations on the breadth or sweep of administrative agency summonses. In the former, the Court suggested that if a subpoena were too broad or too indefinite, it might take on the aspect of a general warrant or writ of assistance, thus violating the Fourth Amendment.¹⁵⁹ In the latter, the Court noted that "a governmental investigation . . . may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power."¹⁶⁰ Perhaps, then, a summons which is not addressed to specific addressees, but authorizes the Service to inspect books and records of any person or firm, or even specified classes of persons or firms, would so closely resemble the prohibited general warrant that it would not be enforced.¹⁶¹

¹⁵⁶ In issuing subpoenas and in questioning witnesses, the grand jury need not have particular violators in mind. *Hale v. Henkel*, supra note 147.

¹⁵⁷ Cf. *De Masters v. Arend*, supra note 154, at 85, and cases cited therein; *In re Magnus, Mabey & Reynard, Inc.*, supra note 112; *Application of Magnus*, 299 F.2d 335 (2d Cir.), cert. denied, 370 U.S. 918 (1962); *Foster v. United States*, supra note 144; *Hubner v. Tucker*, supra note 99; *McMann v. SEC*, supra note 131; *First Nat'l Bank v. United States*, supra note 138; *In re Andrews*, 18 F. Supp. 804 (D. Md. 1937); *In re Upham's Income Tax*, 18 F. Supp. 737 (S.D.N.Y. 1937); *Caplis v. Helvering*, 4 F. Supp. 181 (E.D.N.Y. 1933); *Cooley v. Bergin*, supra note 135. But cf. *Reisman v. Caplin*, supra note 39; *In re Albert Lindley Lee Memorial Hosp.*, 209 F.2d 122 (2d Cir. 1953); *Falsone v. United States*, supra note 136; *In re International Corp. Co.*, supra note 112.

As to the availability of common law privileges see *Fahey, Testimonial Privilege of Accountants in Federal Tax Investigations*, 17 Tax L. Rev. 491 (1962); *Lofts, The Attorney-Client Privilege in Federal Tax Investigations*, 19 Tax L. Rev. 405 (1964); *Comment, The Attorney and His Client's Privileges*, 74 Yale L.J. 539 (1965). See generally 8 *Wigmore*, supra note 109, at ch. 82.

¹⁵⁸ *United States v. First Nat'l Bank*, supra note 133.

¹⁵⁹ 327 U.S. 186 (1946).

¹⁶⁰ Supra note 131, at 652.

¹⁶¹ *Hale v. Henkel*, supra note 147, at 76. But cf. *Stanford v. Texas*, supra note 125, at 512 n.14.

The next question relates to the effect of hardship. Assuming that neither of the two types of disproportionality is present, will a requested examination be deemed to constitute an "unreasonable burden" on the summoned party if it will cause him hardship? In discussing this question, the status of the party summoned may become relevant. If he is the person whose tax liability is under investigation, a showing of hardship, even great hardship, may not justify a refusal to enforce; the hardship will probably not be deemed to create an unreasonable burden unless it is related to one of the factors already discussed.¹⁶² However, as to third parties whose own liability is not under investigation, the possibility of hardship may provide some additional protection. There may be many situations in which great hardship caused by business disruption or expense resulting from compliance with the summons will be present.¹⁶³ Unlike the taxpayer, the third party is not ordinarily bound to submit to such hardship; he must cooperate with the Service, but he cannot be called upon to make any unusual sacrifice. Just when the burden imposed will be deemed unreasonable, however, will depend upon the facts of the particular case.¹⁶⁴

Serious consequences to the individual's long-standing protection against actual, as well as against figurative searches and seizures may flow from the decision in *Shapiro v. United States*.¹⁶⁵ Mr. Justice Frankfurter suggested the possibilities in his vigorous dissent. If the records required to be kept are public records, he stated, "[T]he Government should be able to enter a man's home to examine or seize such public records, with or without a search warrant, at any time. If an individual should keep such records in his home, as millions do, instead of his place of business, why is not his home for some purposes and in the same technical sense, a 'public' library?"¹⁶⁶ That Mr. Justice Frankfurter clearly had in mind records required to be kept under the Internal Revenue Code and Treasury regulations when he wrote the quoted lines is evident from the fact that he cited these authorities in the prior paragraph of his opinion.

B. *The Privilege Against Self-Incrimination*

Well-established principles limit the availability of the Fifth Amendment privilege against self-incrimination to individuals who

¹⁶² E.g., *Hale v. Henkel*, supra note 147 at 77 (hardship plus lack of particularity). But cf. *Oklahoma Press Pub. Co. v. Walling*, supra note 159, at 217 ("There is no harassment when the subpoena is issued and enforced according to law.") and compare with *Bolich v. Rubel*, 67 F.2d 895 (2d Cir. 1933) (The court can probably prevent "plain oppression.")

¹⁶³ Cf. *United States v. United Distillers Prods. Corp.*, supra note 146.

¹⁶⁴ An entity operating under a government franchise, for example, may have a greater duty to submit to onerous investigation than a private individual. Cf. *Cooley v. Bergin*, supra note 135.

¹⁶⁵ 335 U.S. 1 (1948), discussed in text at note 75, supra.

¹⁶⁶ *Id.* at 54-55.

wish to avoid incriminating themselves by their own oral testimony or by producing private papers and documents held by them in a personal capacity.¹⁶⁷ The thrust of the *Shapiro* doctrine is to limit further the availability of the privilege by taking written materials out of the ambit of its protection if they are required by law to be kept.¹⁶⁸ In the area of revenue investigations, the impact of this doctrine is devastating. The record keeping requirements of the Internal Revenue Code and the tax regulations are extremely broad and general. With the exception of farmers and wage earners, all persons either subject to the income tax, or required to file information returns, must keep "permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information" so long as these records "may become material in the administration of any internal revenue law."¹⁶⁹ Farmers and "individuals whose gross income includes salaries, wages, or similar compensation for personal services rendered" must keep "such records as will enable the district director to determine the correct amount of income subject to the tax" for the same indefinite period.¹⁷⁰ Under the circumstances, although a narrower interpretation is possible, practically every record or document which sheds light on taxable income may be deemed a record required by law to be kept.¹⁷¹ This would seem to include, among other things, checks, bank statements, records of gambling winnings and losses, receipts for all deductible expenses, correspondence relating to taxable transactions, records of automobile mileage, and any number of like items which record the everyday economic life of the taxpayer.¹⁷² Under the *Shapiro* doctrine, the recipient would have to deliver up any of these things upon demand by the Service, irrespective of the incriminating nature of the item de-

¹⁶⁷ See generally 8 Wigmore, *supra* note 109, at ch. 80; Redlich, *Searches, Seizures, and Self-Incrimination in Tax Cases*, 10 Tax L. Rev. 191 (1954).

¹⁶⁸ See generally Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687 (1951).

¹⁶⁹ Guide to Record Retention Requirements, 29 Fed. Reg. 3029, 3055 (1964); Int. Rev. Code of 1954, § 6001.

¹⁷⁰ *Ibid.*

¹⁷¹ See, e.g., *United States v. Clancy*, 276 F.2d 617 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961) (records kept by gamblers "reflecting transactions carried on in the course of a taxable wagering activity"); *United States v. Boccuto*, 175 F. Supp. 886, 889 (D.N.J.), appeal dismissed, 274 F.2d 860 (3d Cir. 1959) (accountant's work papers); *United States v. Willis*, 145 F. Supp. 365 (M.D. Ga. 1955) (records relating to wagers). But cf. *Application of House*, 144 F. Supp. 95, 103 (N.D. Cal. 1956) (accountant's work papers held not to be required records under *Shapiro* doctrine).

¹⁷² Apparently, if there is fraud, the taxpayer must keep the records permanently, since there is no statute of limitation to bar assessment for fraud, and since the records must be kept so long as they "may become material in the administration of any internal revenue law."

manded.¹⁷³ Thus, the privilege in tax investigations would be relegated to the protection of oral testimony and to the residue of written material held by the witness which sheds no light on the amount of tax liability. And, as to the latter, the privilege may not be available because of record keeping requirements in statutes and regulations other than the Internal Revenue Code.¹⁷⁴

C. Due Process Rights

No serious change in practice would result should the witnesses be found to have no rights of appraisal, confrontation and cross-examination in Internal Revenue investigations because of the application of *Hannah v. Larche*.¹⁷⁵ Generally speaking, the courts have taken the view that the witness under investigation by tax agents in a routine audit has no right to be apprised that the examination is for the purpose of uncovering criminal tax violations, or for other unauthorized purposes, nor is he entitled to any warning that he may incriminate himself.¹⁷⁶ It is only when the agents have deliberately used deceit, fraud, or force to gain the witness's cooperation that the courts have suppressed the evidence obtained thereby.¹⁷⁷ Thus, the absence of a right to appraisal will cause practically no change in the existing approach. As to the confrontation of accusers and cross-examination of witnesses, summoned parties have rarely claimed such rights in tax investigations. Rather, the claim usually is that the witness is entitled to the presence of counsel when he appears in compliance with the summons and, occasionally, that other persons be present.¹⁷⁸ The courts have generally honored his request for counsel, although they do not favor the presence of the other persons.¹⁷⁹ The right to confront accusers and to cross-examine adverse witnesses is fully protected in the trials wherein civil or criminal tax liability is adjudicated, or when the summoned party is tried either for contempt or under the statute imposing criminal penalties for failure to obey the summons.

¹⁷³ See *United States v. Clancy*, supra note 171; *Beard v. United States*, 222 F.2d 84 (4th Cir.), cert. denied, 350 U.S. 846 (1955); *Falsone v. United States*, supra note 136, at 739. Compare *Application of Daniels*, 140 F. Supp. 322, 325-26 n.2 (S.D.N.Y. 1956).

¹⁷⁴ See generally *Guide to Record Retention Requirements*, supra note 169.

¹⁷⁵ 363 U.S. 420 (1960), discussed in text at note 85, supra.

¹⁷⁶ *Redlich, Searches, Seizures, and Self-Incrimination in Tax Cases*, supra note 167, at 204-09.

¹⁷⁷ *Ibid.* *Burns, Searches and Seizures: The Suppression of Evidence*, 20 Inst. of Fed. Tax (N.Y.U.) 1081 (1962).

¹⁷⁸ See, e.g., *Torras v. Stradley*, 103 F. Supp. 737 (N.D. Ga. 1952) (counsel and stenographer).

¹⁷⁹ *Ibid.* In *Torras* the court refused to allow the witness' stenographer to be present, or to allow the witness to use the same counsel used by the taxpayer under investigation, but the right to counsel was recognized. Also see *Backer v. Commissioner*, 275 F.2d 141 (5th Cir. 1960) and *Rogge, Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations-I*, 47 Minn. L. Rev. 939, 945 (1963).

It can be argued, however, that the reverse implication of *Hannah* might require the allowance of these rights in tax investigations. That is, if such investigations may be deemed adjudicative under the criteria established in *Hannah*, and not purely fact-finding,¹⁸⁰ then it is arguable that witnesses summoned in tax investigations must be apprised of possible criminal charges against them and must also have the right to confront and cross-examine informers. However, the last two rights would prove so disruptive of the process of investigation that they might not seem warranted under the balancing of interests approach to due process adopted in the *Hannah* decision. On the other hand, the right of appraisal, which does not cause an actual disruption of the procedure of the investigation, might henceforth be required for witnesses being investigated for their own crimes.¹⁸¹ Even so, the knowledge that he was being investigated for purposes other than his civil tax liability would be of limited importance to a witness if his ability to assert constitutional protection is circumscribed by the application of the decisions discussed earlier.

Subject only to the possible interposition of common law privileges,¹⁸² it would seem safe to conclude that the catalogue of last-ditch defenses available to parties seeking to resist tax summonses, especially those calling for the production of books and records, is fairly meager. The statutory protections are mostly technical; the constitutional safeguards are available only to ward off the most outrageous and obvious abuses; and the recently affirmed judicial power to refuse to enforce summonses issued for improper purposes is crippled by imposing the burden of proof upon the parties, who may be ill-equipped to sustain it. When it was argued in *Oklahoma Press* that turning the courts into rubber stamps abased or abused the judicial function, the Supreme Court replied that the courts still retained the power to decide important questions relating to summons enforcement. It noted that "the issues of authority to conduct the investigation, relevancy of the materials sought, and breadth of the demand are neither minor nor ministerial matters."¹⁸³ The fact is, however, that in tax investigations these issues may have become ministerial or minor. To the extent that zealous revenue agents may frame wide-ranging summonses, valid on their face, for a variety of purposes other than those expressly authorized by the Code and have them uncritically enforced, the summoned party stands naked before the government agency, stripped of judicial protection. For all practical purposes the famous dictum in *ICC v. Brimson*¹⁸⁴

¹⁸⁰ See discussion in text *infra* following note 224.

¹⁸¹ Cf. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹⁸² See note 157, *supra*. Also see Comment, 31 U. Chi. L. Rev. 395 (1964).

¹⁸³ *Supra* note 159, at 217 n.57.

¹⁸⁴ 154 U.S. 447, 485 (1894).

denying the right of an administrative agency to compel obedience to its own orders is a dead letter.

V. ALTERNATIVES TO ACCOMMODATE COMPETING POLICIES

In light of the conclusions just adduced, the potential danger to the collective security from relatively uninhibited investigatory powers ought not to be minimized. Rather, it would seem prudent to attempt to fashion new approaches which will prevent the undesired results from occurring but which will not seriously interfere with the performance of the legitimate functions of the Service.¹⁸⁵ The alternatives discussed here include both legislative and judicial proposals. The applicability of the techniques used for framing such alternatives is not limited to the IRS.

A. *Granting Wider Protection to Individuals*

The common thread which runs through the *Endicott Johnson*, *Oklahoma Press*, *Morton Salt*, and *Powell* cases is the fact that the entities under investigation for possible statutory violations were corporations. In each case the subpoenas calling for the production of books and records were addressed either to corporate officers or directly to the corporation itself, and the subpoenas called for the production of corporate records. Is it not possible, therefore, to limit their thrust, as well as their facts, to investigations of corporations and, perhaps, of large impersonal organizations? Indeed, there is language in *Oklahoma Press*¹⁸⁶ and *Morton Salt*¹⁸⁷ which, harkening back to *Wilson v. United States*,¹⁸⁸ stresses the power which Congress possesses over such organizations. The clear implication of this language is that private individuals are entitled to special protection.

Furthermore, it has long been settled that the privilege against self-incrimination is a personal privilege of private individuals.¹⁸⁹ If Fourth Amendment protection from constructive searches and seizures depends upon the availability of the Fifth Amendment privilege,¹⁹⁰ it follows that such protection is only available to private individuals.

There are several factors, however, which militate against the suggested limitation.

¹⁸⁵ See Judge Swan's concurring opinion in *United States v. United Distillers Prods. Corp.*, supra note 146, at 875:

In these days when Government has to conduct so many investigations of private business, it is important that oppressive interference by governmental agents be as limited as is reasonably consistent with the public interest.

¹⁸⁶ Supra note 159, at 204-06.

¹⁸⁷ 338 U.S. 632, 652-53 (1950).

¹⁸⁸ 221 U.S. 361 (1911).

¹⁸⁹ 8 Wigmore, Evidence § 2259a (McNaughton rev. 1961, Supp. 1964). See *Wild v. Brewer*, 329 F.2d 924 (9th Cir. 1964); Note, 78 Harv. L. Rev. 455 (1964). But see Comment, *The Attorney and His Client's Privileges*, supra note 157.

¹⁹⁰ See note 125, supra.

In the first place, *Morton Salt*, *Oklahoma Press*, and *Powell* contain references which seem to brook no exception for individuals. In all three cases the Court had occasion to set forth the broad powers of administrative agencies, likening their powers to those of grand juries—inquisitorial bodies which may investigate merely to assure themselves that the law is not being violated.¹⁹¹ No language attempted to limit the analogy to investigations of corporations or impersonal associations. In addition, the Court has equated the investigatory power of the administrative agency with that of a court issuing orders for pre-trial discovery.¹⁹² Of course, the mere existence of such references is not conclusive. Insofar as they extend the application of the decisions to individuals, they may be treated as dicta. However, it is very difficult to ignore them, since they reflect an extremely permissive philosophy on the Court's part as to the purposes and needs of administrative agencies.

Secondly, the decision in *CAB v. Hermann*¹⁹³ seems to reject the notion that private records held in a personal capacity are entitled to special protection. In the court of appeals opinion, Judge Fee, writing for the court, expressly distinguished between records held by entities and by individuals subject to the control of the CAB and documents held by private parties relating entirely to their personal affairs. As to the former, he stated: "[T]he showing as to materiality and relevancy might not necessarily be as comprehensive as that required in other cases."¹⁹⁴ As to the latter: "[T]he court should protect the privacy of the individuals as against the encroachment of administrative bodies."¹⁹⁵

However, in reversing the court of appeals and reinstating the district court order directing compliance with the subpoenas, the Supreme Court, in its somewhat cryptic per curiam decision, did not see fit to discuss the claim of special treatment for personal documents held by private individuals; no distinction was drawn between the types of documents called for. In light of this fact, plus the Court's citation of *Endicott Johnson* and *Oklahoma Press* in support of its opinion,¹⁹⁶ it may be concluded that the Court was treating the broad holding of these cases as applicable to individuals, as to others, without

¹⁹¹ *United States v. Morton Salt Co.*, supra note 187, at 642-43 (The Court in this section of the opinion was concerned only with the question whether the FTC's order infringed on the jurisdiction of the court of appeals.); *Oklahoma Press Pub. Co. v. Walling*, supra note 159, at 216 (The Court quoted from *Blair v. United States*, 250 U.S. 273 (1919), which involved a grand jury subpoena directed to an individual in his capacity as such.); *United States v. Powell*, 379 U.S. 48, 57 (1964).

¹⁹² *Oklahoma Press Pub. Co. v. Walling*, supra note 159.

¹⁹³ 353 U.S. 322 (1957).

¹⁹⁴ *Hermann v. CAB*, 237 F.2d 359, 363 (9th Cir. 1956).

¹⁹⁵ *Ibid.*

¹⁹⁶ Supra note 193, at 324.

qualification. It is suggested, however, that this interpretation carries the decision too far. In the first place, no questions of "probable cause" or "coverage" were before the Court. Secondly, the only objections of which the Court took cognizance were that "the subpoenas were vague, excessively broad in scope, and oppressive" and that the Board had failed to comply with the detailed procedure recommended by Judge Fee for determining the relevance and materiality of the documents sought. Thus, it is difficult to argue that *Hermann* fully extended the prior cases to private individuals.

But even if the *Endicott Johnson*, *Oklahoma Press*, and *Morton Salt* decisions are limited to their facts, (*i.e.* embracing only corporate witnesses), the *Shapiro* doctrine would seem to lead to the same result for individuals requested to produce required records. As has been pointed out on many occasions, the administrative subpoena seeking books, records and documents constitutes only a figurative or constructive search and seizure, to which Fourth Amendment protections are only available by analogy.¹⁹⁷ And if, as the leading case of *Boyd v. United States*¹⁹⁸ tells us, the analogy is appropriate because of the interrelationship of the Fourth and Fifth Amendments, then it is only the compulsory production of material protected by the privilege against self-incrimination which will constitute an unreasonable search and seizure.¹⁹⁹ Therefore it can be argued, consistently with *Boyd*, that the Fourth Amendment is not only inapplicable to demands for non-incriminating documents but, as a result of *Shapiro*, is now inapplicable to incriminating documents which are required by law to be kept since, as to them, the Fifth Amendment affords no protection. Thus, the individual holding such records is in no better position as to those records than a corporation or corporate officer is as to corporate records.²⁰⁰ This reasoning, however, might still leave it open for a court to hold that incriminating records which are not required by law to be kept are held by the individual subject to the Fourth Amendment requirement that they not be subpoenaed except upon a showing of probable cause.

There is another approach to the key decisions which might justify special treatment for private individuals. A characteristic method of eliminating constitutional roadblocks to governmental control and regulation has been to find that the privilege of conducting an activity is granted subject to qualifications or conditions, by virtue of which constitutional rights are excluded from the grant or surrendered as the

¹⁹⁷ *Oklahoma Press Pub. Co. v. Walling*, supra note 159, at 202.

¹⁹⁸ 116 U.S. 616 (1886).

¹⁹⁹ But see note 125, supra.

²⁰⁰ See *Shapiro v. United States*, supra note 165, at 55 (Mr. Justice Frankfurter dissenting) quoted in text at note 166, supra; *Application of House*, supra note 171, at 99 ("If it is not self-incriminating to require taxpayers to turn over these documents,

price of receiving it.²⁰¹ As Mr. Justice Jackson stated in *Morton Salt*, justifying the broad powers of inquisition held by law-enforcing agencies over corporations: "They [corporations] have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation."²⁰² It would follow, then, that the major decisions involving investigations of corporations could be restricted in their Fourth Amendment limiting effect to corporate bodies and to activities franchised by the government or subject to governmental regulation; and, similarly, that *Shapiro*, which involved an activity clearly within the power of Congress to regulate and license during wartime, would not apply to individuals engaged in non-regulated activities.

This reasoning is not entirely unsupported. Appropriate language has already been cited from *Morton Salt*.²⁰³ In *Oklahoma Press* the Court relied heavily on the corporate character of the documents sought and on the broad visitatorial and investigative powers of the government over corporations.²⁰⁴ It cited *Wilson v. United States*,²⁰⁵ the earlier case in which the Supreme Court had placed corporate documents outside the protection of the privilege against self-incrimination. In *Wilson* the Court plainly based its decision upon the burden of disclosure which attaches to the privilege of corporate existence. There, Mr. Justice Hughes quoted extensively from *Hale v. Henkel*²⁰⁶ where, quaintly reflecting the limited government of an earlier day, the Court contrasted the rights of the individual with those of the corporation. It noted that the individual owes no duty to the State "to divulge his business, or to open his doors to an investigation . . . since he receives nothing therefrom, beyond the protection of his life and property." The corporation, however, "receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers."²⁰⁷

Notwithstanding the transition from the *laissez-faire* government of 1911 to the modern welfare state, this reasoning is still viable, insofar as it supports a principle which leaves constitutional rights un-

it is difficult to see why it is an unreasonable search and seizure, provided the statutory procedure is observed.")

²⁰¹ See Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

²⁰² Supra note 187, at 652.

²⁰³ Ibid.

²⁰⁴ Supra note 159, at 204.

²⁰⁵ Supra note 188.

²⁰⁶ 201 U.S. 43 (1906).

²⁰⁷ Id. at 74-75.

trammelled except where surrendered in aid of the regulation of the exercise of a special privilege which Congress could withhold.

Likewise, on its facts, if not on its reasoning, *Shapiro v. United States* provides support for the suggested benefit-burden theory. The decision is grounded mainly on the notion that records required to be kept become quasi-public records; this is obviously a boot-strap argument which can lead only to the absurd results suggested by Mr. Justice Frankfurter in his dissent.²⁰⁸ However, the majority clearly recognized that Congress, by virtue of its extraordinary war emergency powers, could constitutionally license the very ordinary business activities which were involved. It noted that the transaction which was recorded in the particular record which had caused the difficulty "was one in which the petitioner could lawfully engage solely by virtue of the license granted to him under the statute."²⁰⁹ And when it admitted the existence of constitutional boundaries on the power of government to require records to be kept, the majority avoided the application of those mysterious limitations to the case before them by stating:

[N]o serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern *so that the Government can constitutionally regulate or forbid the basic activity concerned*, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator. (Emphasis supplied.)²¹⁰

By emphasizing the power to forbid the activity, it is possible to bring this decision within the benefit-burden theory. Since Congress had power to prevent Shapiro from wholesaling fruit and produce, it could grant him the privilege of doing so on the condition that he relinquish his privilege against self-incrimination as to those books and records which must be kept if the authorized controls were to be enforced.

The benefit-burden approach, however, presents some logical difficulties. In the first place, where the surrender of rights is grounded on the consent of the recipient of the privilege or on the deliberate reservation of rights by the government, it must be conceded that such consent or reservation is ordinarily implied, and is, therefore, fictional.²¹¹ In the ordinary case, the regulated individual is probably totally unaware that he has relinquished any rights; and the state does not expressly reserve its rights of visitation each time it issues a corporate charter. Furthermore, it is unrealistic in the extreme to assert

²⁰⁸ Supra note 165, at 55.

²⁰⁹ Id. at 35.

²¹⁰ Id. at 32.

²¹¹ See Meltzer, supra note 168, at 701-19; 78 Harv. L. Rev. 455, supra note 189, at 456-57. Cf. *International Shoe Co. v. Washington*, 326 U.S. 310, 318-19 (1945).

that an individual subject to regulation had a choice which he voluntarily undertook, especially in the *Shapiro* type of situation, where thousands of businessmen suddenly found that their ordinary means of earning a livelihood had become a licensed activity.

Secondly, the Supreme Court itself has seemed to reject this approach. In *United States v. White*,²¹² the *Wilson* doctrine, denying corporate officers the privilege against self-incrimination as to corporate documents in their possession, was extended to custodians of the records of impersonal unincorporated associations. The opinion made it clear that the Court was not relying on any reservation of rights or on the granting of any benefit. It stated:

The fact that the state charters corporations and has visitatorial powers over them provides a convenient vehicle for justification of governmental investigation of corporate books and records. *Hale v. Henkel*, *supra*; *Wilson v. United States*, *supra*. But the absence of that fact as to a particular type of organization does not lessen the public necessity for making reasonable regulation of its activities effective, nor does it confer upon such an organization the purely personal privilege against self-incrimination. Basically, the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.²¹³

It must be noted, however, that on its facts the *White* case may be consistent with the suggested approach. The organization being investigated, a union, was subject to government regulation with respect to the activity being investigated—the construction of a naval supply depot. The granted benefit was the government contract and the resultant jobs for union members. Nonetheless, it must be conceded that the articulated policy underlying the limitation of constitutional rights in agency investigations evidenced by this case and in the key decisions cannot be restricted to cases where Congress is exercising regulatory power. This policy provides that governmental agencies conducting activities properly authorized by Congress must have investigatory powers equal to their tasks. Thus, Mr. Justice Jackson, in his dissent in *Shapiro*, apparently saw no logic in limiting the required records doctrine to regulatory laws.²¹⁴

²¹² 322 U.S. 694 (1944).

²¹³ *Id.* at 700-01.

²¹⁴ *Supra* note 165, at 70-71.

Lastly, *Hannah v. Larche*²¹⁵ provides no support for the benefit-burden approach either in its reasoning or on its facts. Private individuals, exercising no regulated privilege at the grace of the government, were held not entitled to the due process rights of appraisal, confrontation and cross-examination when summoned to testify before the Civil Rights Commission.

In spite of these difficulties, however, there may be merit in restricting the scope of the key decisions, save *Hannah*, to persons summoned to testify or to produce documents relating to activities which they carry on at the grace of the government.²¹⁶ Otherwise, we may be left with a situation in which Congress has uncontrolled discretion to undermine Fourth and Fifth Amendment rights in any area in which it is constitutionally empowered to act, simply by granting investigative powers and imposing record-keeping requirements in aid of such power. This, as Professor Meltzer has mildly stated, "is a bizarre result in a constitutional system."²¹⁷ Once we concede that the implementation of authorized powers justifies a relaxation of some constitutional protections under the Fourth and Fifth Amendments, there is nothing in logic to prevent relaxation of other, more fundamental rights as well in aid of the exercise of other powers.²¹⁸ Secondly, watching the nation's highest court strike down constitutional rights designed to afford protection against governmental powers on the theory that those powers will be difficult to exercise if the rights are left standing is not a pretty sight. Accordingly, if the choice is between leaving the limitations on Congress' power to destroy these rights to the vagaries of a general policy favoring such power, or on the other hand, fashioning an *a posteriori* rule which may be based to some extent upon a fiction, but which affords a reasonable basis for justifying the withdrawal of rights in most of the past cases and for drawing a penumbral boundary limiting the withdrawal of such rights in future cases, the desire for logic and consistency should not interfere with our preference for the fiction.²¹⁹ Of course, one could take the absolutist view, suggested by Mr. Justice Frankfurter's dissent in *Shapiro*, that the exercise of congressional power never justifies the relaxation of the

²¹⁵ Supra note 175.

²¹⁶ Cf. *Cooley v. Bergin*, 27 F.2d 930, 933 (D. Mass. 1928):

A national bank is a public institution, receiving a valuable franchise from the government, and it should recognize an obligation to aid the federal authorities in the administration of its laws, so far as it is compatible with its duty to its customers.

²¹⁷ Supra note 168, at 712.

²¹⁸ See Mr. Justice Jackson's dissenting opinion in *Shapiro v. United States*, 335 U.S. 1, 70-71 (1948).

²¹⁹ There are better alternatives. Some of them are explored in the remainder of this article.

constitutional rights of individuals. In attacking the majority's view that records become "public" if they are the records of a business subject to government regulation or licensing, he stated:

While Congress may in time of war, or perhaps in circumstances of economic crisis, provide for the licensing of every individual business, surely such licensing requirements do not remove the records of a man's private business from the protection afforded by the Fifth Amendment. Even the exercise of the war power is subject to the Fifth Amendment.²²⁰

The adoption of this view, which is perhaps more forthright than the benefit-burden theory, would require the overruling of *Shapiro*, a possibility which ought not to be discounted.

From the Service's point of view, however, the granting of greater protection to individuals than to impersonal organizations may not be the best solution. It is mechanistic and gives no weight to the Service's legitimate needs for information. Such needs may vary greatly from investigation to investigation because of facts other than the status of the witness.

B. *Providing Special Treatment for Tax Investigations*

The prospects for convincing the Court that tax investigations should receive special treatment appear to be dim, since the Court has already accepted the analogy between such investigations and investigations conducted by other governmental agencies. In light of the importance of the policy questions involved, however, it might be possible to persuade the Court, or, if not the Court, then the Congress, to re-examine this analogy.

1. Sources of Power

The most obvious distinction between the Internal Revenue Service and the agencies involved in the key decisions is that none of the latter involved a delegation by Congress of its constitutional power to lay and collect taxes. In *Shapiro*, for example, the Price Administrator of the Emergency Price Control Act was acting under a delegation by Congress of its emergency war powers.²²¹ From this it might be argued that Congress had greater investigatory power to delegate in *Shapiro* under its war powers than it has under its taxing power. Similar reasoning might be advanced to distinguish the diverse powers exercised by the agencies involved in the other cases. On closer scrutiny, however, this argument breaks down. The power to pass laws

²²⁰ Supra note 218, at 65.

²²¹ See *Yakus v. United States*, 321 U.S. 414 (1944), especially the dissenting opinion of Mr. Justice Roberts at 459.

providing for investigations, whether it derives from the war power, the power to regulate commerce, the power to legislate, the power to levy and collect taxes, or, for that matter, from any other enumerated power, is nowhere expressly provided for in the Constitution. It is an implied or incidental power which exists by the grace of the "necessary and proper" clause.²²² To try to divine limitations on particular types of investigations, not applicable to others, from this clause in the Constitution is an exercise in futility.²²³

2. Functional Differences

In *Hannah v. Larche* the Court was careful to note that the Civil Rights Commission was performing a purely investigative rather than an adjudicative function.²²⁴ The implication was clear that the decision would have gone the other way had the Commission been engaged in adjudication. This suggests that there may be some merit in comparing the functions performed by the IRS with those performed by other agencies in order to find possible bases for distinguishing their respective investigative powers.²²⁵

At the outset, it must be recognized that investigations often serve a variety of purposes—some immediate, others consequential or remote. Most investigations conducted by governmental agencies have as their primary objective the finding of facts. These facts may then be used in any number of ways by the investigating agency itself or by other agencies to aid the performance of other functions or objectives. Thus, the purpose of an investigation may be described in terms of its ultimate utility, as in aid of a particular type of power reposed in Congress—*e.g.*, regulation, revenue collection, legislation, etc. Or it may be useful, for purposes of comparison, to label an investigation by reference to the functional phases of the decision-making process in which the agencies using the facts are involved. These functional phases may include intelligence gathering, recommending, invoking, applying, prescribing, appraising, and terminating.²²⁶

²²² U.S. Const. art. I, § 8.

²²³ Cf. Meltzer, Required Records, the McCarran Act, and the Privilege Against Self-Incrimination, 18 U. Chi. L. Rev. 687, 717 (1951).

²²⁴ 363 U.S. 420, 451 (1960).

²²⁵ Consult Newman, Due Process, Investigations, and Civil Rights, 8 U.C.L.A. L. Rev. 735, 752-54 (1961) and Note, The Distinction Between Informing and Prosecutorial Investigations: A Functional Justification for "Star Chamber" Proceedings, 72 Yale L.J. 1227 (1963).

²²⁶ Consult McDougal & Associates, Studies in Minimum World Order 14-15 (1960):

(1) Prescription is the articulation of general requirements of conduct Prior in time to prescription in a given sequence is (2) *recommendation*, or the promoting of prescriptions Also the (3) *intelligence* function is typically prior in time to prescription or recommendation; it includes the gathering and processing of information about past events and the making of estimates of the future, especially of the costs and gains of alternative policies

If the ultimate objective of federal tax investigations is considered, it becomes obvious that, on this basis, no demand for greater protection for witnesses involved in such investigation can be justified. In fact, the converse is true. Since adequate revenue is necessary for the operation of nearly all governmental functions, it can hardly be argued that its collection is less important, and therefore less deserving of effective instruments of enforcement, than the functions performed by the other agencies.²²⁷

When the functional phases of the decision-making process engaged in by the agencies involved in the leading decisions are compared with those engaged in by the IRS, with the exception of *Hannah v. Larche*, the same result obtains. Translating the authorized purposes of federal tax investigations into functional categories, the Service may be said to investigate for the purpose of invoking the prescriptions which it is its job to administer—the Internal Revenue Code. That is, the information gleaned from an investigation may be the basis on which the Service initiates action which will ultimately cause the Code to be applied in particular cases.²²⁸ The formal application of the Code is not a function of the Service; rather, this is the job of the Tax Court or the federal district court; the Service may not adjudicate.²²⁹ Nonetheless, the Service effects the application of the Code in particular cases, frequently obtaining settlement of claims without further official action. Although rights of taxpayers may actually be affected by the Service in such a settlement, it is only through the taxpayer's acquiescence that the Service's determination of his rights becomes binding, since the taxpayer may insist on a formal hearing *de novo*.²³⁰

Similarly, the agencies and administrators involved in *Endicott Johnson*, *Oklahoma Press*, *Morton Salt*, *Hermann*, and *Shapiro* were engaged in authorized invocation of the prescriptions and policies which Congress put in their charge. Since, as in the case of the IRS, the invoking of prescriptions in these cases could eventually lead to the

(4) *Invocation* consists in making a preliminary appeal to a prescription in the hope of influencing results (5) *Application* is the final characterization of a situation in reference to relevant prescriptions The (6) *appraisal* function formulates the relationship between official aims and subsequent levels of performance The function of (7) *termination* is the putting to an end of authoritative prescriptions and of arrangements arising within them.

²²⁷ See Meltzer, *supra* note 223, at 717.

²²⁸ See 9 Mertens, *Law of Federal Income Taxation* § 49.01 (1958). See Reich, Mr. Justice Black and the Living Constitution, 76 Harv. L. Rev. 673, 731 (1963):

Various types of "civil" or "preliminary" investigations can be used, and commonly are used, to obtain evidence to be introduced later in criminal prosecutions. Investigations thus become an integral part of the criminal trial itself.

²²⁹ See Mertens, *supra* note 228.

²³⁰ However, there is a presumption that the Commissioner's assessment is *prima facie* correct. *Id.* at § 50.71.

adjudication of the rights of the investigated parties and were in fact performed for that purpose, a comparison of functions provides no support for the argument that witnesses before the IRS are entitled to greater protection than that afforded in the other agencies. An argument might be made, however, that a party before the IRS is entitled to *less* protection than one before an agency performing the applying function such as, for example, the CAB with its quasi-judicial powers. There are, however, several factors which militate against this argument. In the first place, the quasi-judicial functions of administrative agencies are often separated from the preliminary investigations conducted to invoke those functions. Secondly, the Court in *Oklahoma Press* seemed to reject a proffered distinction between the powers of agencies with quasi-judicial powers and those which could only invoke action by the courts. The Court noted:

The mere fact that the first stage of formal adjudication is administrative in the one case and judicial in the other would seem to make no difference with the power of Congress to authorize either the preliminary investigation or the use of the subpoena power in aid of it.²³¹

The force of this declaration seems to be supported by the simple fact that the substantive rights of the party being investigated are as much in jeopardy when the agency turns the matter over to the courts for adjudication as they are when the agency itself conducts the formal hearing.²³² Lastly, the Fourth Amendment and the privilege against self-incrimination have traditionally provided protection even before any actual adjudication of a witness's rights has begun.²³³ Thus, their application should not depend on whether the agency conducting the investigation intends to invoke the aid of a court or to make its own binding determination.

In *Hannah v. Larche*, however, the Civil Rights Commission was engaged in the performance of functions entirely different from those involved in the other cases and from those performed by the IRS in ordinary tax investigations. Essentially, the Commission was authorized to perform an intelligence function—the gathering of information and its transmission to the Congress and the President; an appraisal function—the examination of the effectiveness of existing prescriptions and policies in light of the constitutional provision for equal protection of the laws; and a recommending function—the presentation of prescriptions and policies to the President and the Congress with a view

²³¹ 327 U.S. 186, 212 n.51 (1946).

²³² See Reich, *supra* note 228.

²³³ See *In re Andrews' Tax Liability*, 18 F. Supp. 804, 807 (D. Md. 1937); cf. *Escobedo v. Illinois*, *supra* note 181; *Meltzer*, *supra* note 223, at 693. But cf. *Sullivan v. United States*, 274 U.S. 259 (1927).

to their adoption in the future and the presentation of suggestions for termination or modification of existing prescriptions and policies.²³⁴ The Court, in holding the claim of due process inapplicable, relied heavily on the purely investigative, non-adjudicative nature of the Commission's function. Rightly or wrongly it refused to take into account the possibility that results not specifically authorized, such as the application of existing prescriptions to the witness by other agencies using information gathered by the Commission, might ultimately occur, since "such collateral consequences . . . would not be the result of any affirmative determinations by the Commission."²³⁵ It therefore termed the Commission's function purely investigative. In light of the fundamental differences in the authorized functions being performed by the Commission as compared to those of the IRS, especially the fact that the former is more remote from the applying function than the latter, it can be argued that *Hannah* does not apply to tax investigations.²³⁶ Thus the Supreme Court is not bound by its decision in that case should the question of the existence of the right of appraisal of a witness in a federal tax investigation come before it.

3. Grand Jury Inquisitions Distinguished

Another organ of government with which the Internal Revenue Service should be compared is the grand jury, since it possesses extremely broad investigative powers. These include the power to conduct investigations without the necessity of establishing probable cause to believe that any particular law has been violated²³⁷ and, in some cases, to engage in inquisitions of anti-social conduct against which no countervailing sanctions exist.²³⁸ In its proceedings, which are protected by secrecy,²³⁹ witnesses are not afforded the rights of appraisal, confrontation, and cross-examination.²⁴⁰

There is already an impressive body of authority which has equated the investigatory powers of grand juries with those held by administrative agencies in general²⁴¹ and the Internal Revenue Service in particular.²⁴² Ordinarily, the analogy follows from a reasoned

²³⁴ *Hannah v. Larche*, supra note 224, at 440-41.

²³⁵ *Id.* at 443.

²³⁶ But cf. *Torres v. Stradley*, 103 F. Supp. 737 (N.D. Ga. 1952).

²³⁷ *Hale v. Henkel*, supra note 206, at 58-66.

²³⁸ See *Dession & Cohen*, *The Inquisitorial Functions of Grand Juries*, 41 *Yale L.J.* 687 (1932).

²³⁹ See *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956) and cases there cited; Note, *The Grand Jury as an Investigatory Body*, 74 *Harv. L. Rev.* 590, 600 (1961).

²⁴⁰ See *Hannah v. Larche*, supra note 224, at 448-49; 74 *Harv. L. Rev.* 590, supra note 239, at 599-601.

²⁴¹ Including, of course, *Oklahoma Press* and *Morton Salt*. See note 191, supra.

²⁴² *United States v. Powell*, 379 U.S. 48 (1964); *Falsone v. United States*, 205 F.2d 734, 737, 742 (5th Cir.), cert. denied, 346 U.S. 864 (1953) (The court noted the "im-

decision that the administrative agency seeking such powers is independently entitled to them on constitutional and statutory grounds, and merely serves the purpose of illustrating the type or extent of investigatory power available to such agency.²⁴³ There can be no quarrel with this type of decision. There is danger, however, that judges may uncritically equate administrative agencies with grand juries and then grant such agencies equally broad powers without first finding independent justification for the grant.²⁴⁴

It must be remembered that the grand jury found its way into the Fifth Amendment to the Constitution—a part of the Bill of Rights—as a buffer between the individual and the awesome power of the State.²⁴⁵ Their members, drawn from the “neighborhood,” may be far more impartial than legislators or employees of administrative agencies.²⁴⁶ It is this protective feature of the invoking and recommending functions of the grand jury which gives that body its unique characteristics. It would be a perversion of reason, therefore, to take the same broad powers of inquisition and accusation vested in a tribunal designed to protect the citizen from oppressive activities of agencies of government, to deliver them up to those agencies, and then to justify the handout on the ground that the grand jury and the recipient agencies are performing similar functions.²⁴⁷

C. Hoover Commission Recommendations

The Hoover Commission Task Force has suggested that Section 6 of the Administrative Procedure Act be amended “to establish a jurisdictional prerequisite for the issuance of a subpoena [*sic*] and for the initiation, as well as the conduct, of any investigation.”²⁴⁸ While this amendment would, in effect, overrule the earlier decisions by re-

portant difference” that reports of grand juries are made to the courts, while the results of tax investigations are reported to the Commissioner, who then decides on appropriate action. *Id.* at 737.) But see *Hubner v. Tucker*, 245 F.2d 35, 39 n.6 (9th Cir. 1957) (“The agency is not the arm of a court, as is a grand jury.”)

²⁴³ E.g., *Oklahoma Press Pub. Co. v. Walling*, *supra* note 231.

²⁴⁴ E.g., *Brownson v. United States*, 32 F.2d 844 (8th Cir. 1929).

²⁴⁵ See *Ex Parte Bain*, 121 U.S. 1 (1887); 74 Harv. L. Rev. 590, *supra* note 239.

²⁴⁶ See dissenting opinion of Mr. Justice Douglas in *Hannah v. Larche*, *supra* note 224, at 498.

²⁴⁷ It is true, of course, that investigations conducted by administrative agencies have largely displaced the grand jury in the enforcement of federal legislation. Murchison, *Rights of Persons Compelled to Appear in Federal Agency Investigational Hearings*, 62 Mich. L. Rev. 485, 503 (1964). It would seem to follow, therefore, that since administrative investigations have become a part of the process for applying criminal sanctions, the protections which are available in a criminal trial ought to be extended to witnesses in these investigations. See Reich, *supra* note 228. Also see U.S. Comm’n on Organization of the Executive Branch of the Government, *Report on Legal Services and Procedure* 175 (1955); Newman, *supra* note 225, at 754-55; 72 Yale L.J. 1227, *supra* note 225, at 1231.

²⁴⁸ U.S. Comm’n on Organization of the Executive Branch of the Government, *supra* note 247.

quiring the administrator to establish coverage as a condition of court enforcement of the summons, its impact on tax investigations would be questionable, since, as has been pointed out, there is practically no person or firm over whom the IRS does not already have jurisdiction.

Another recommended amendment, which would require agencies to investigate only when "authorized by statute," and not just when "authorized by law,"²⁴⁹ would also prove ineffectual to impose the suggested limitations on tax investigations, since such investigations are already governed by statute.

Rather, as suggested below, the existing sections of the Internal Revenue Code might be amended to add the needed protection.

D. *Procedural Changes*

In federal tax investigations the collective interest in private security is in jeopardy only insofar as the IRS can freely use its investigatory powers for the purpose of general fact-finding, and not when they are legitimately used only for the revenue purposes enumerated in the statute.²⁵⁰ It follows, therefore, that the private interest would be protected if sufficient conditions were imposed to discourage free-wheeling use of investigations for purposes other than those enumerated in the statute. And the public interest in the collection of revenue would be protected if these conditions were not so burdensome as to interfere with the efficient operation of the revenue system.²⁵¹

What conditions can fulfill both requirements? It is suggested that the desired accommodation can be achieved if the judge called upon to enforce a revenue summons will require the Service to establish to his satisfaction either one of two conditions: (1) that a reasonable basis for suspecting an assessable violation of the Internal Revenue Code exists *or* (2) that the requested inspection or examination is essential to the preservation of the integrity of the self-assessment system of tax collection.

As to condition (1), the judge should require a presentation of facts sufficient to satisfy him that there exists a reasonable suspicion that there has been a civil violation of the tax laws.²⁵² He should not

²⁴⁹ *Ibid.*

²⁵⁰ See Pt. II, *supra*.

²⁵¹ Cf. the opinion of L. Hand, J. in *McMann v. SEC*, 87 F.2d 377, 378 (2d Cir.), cert. denied, 301 U.S. 684 (1937): "The suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme."

²⁵² Prior to *Powell* there was no general agreement as to what constituted probable cause among those circuits which required such a showing before enforcing a revenue summons. See *United States v. Powell*, *supra* note 242, at 59 n.2 (dissenting opinion). It is not my intention here to express a preference for any one of the three tests mentioned in the *Powell* case. In the interests of uniformity, however, the standard for probable cause set forth in *United States v. Ventresca*, 85 Sup. Ct. 741 (1965) might be applied.

accept a conclusionary allegation of suspicion on the part of the agent seeking enforcement, since to do so would defeat the very purpose of the condition. As to condition (2), it should be open to the Service to show that the particular examination or *type* of examination sought is an essential phase of enforcement of the revenue laws or, at the very least, extremely useful in deterring tax avoidance. Most tax investigations would tend to fall within the second category. To ease the burden on the Service, general ground rules might be formulated. For example, the court may presume that the right to make one thorough-going examination of each taxpayer for each tax year still open to assessment within the three year statute of limitations is essential to the integrity of the self-assessment system. In requesting judicial aid in securing such an examination, the Service need only establish that the examination is of an open year, and that the records sought pertain to the tax liability for that year.

Similar presumptions could be created for other investigations, even of closed years, if the Service could show that the particular examination requested fulfilled any one of the following requirements:

- (1) That it was part of a non-discriminatory program to re-examine certain groups of taxpayers, even if the groups were selected without any particular suspicion of actual violations. This could be shown, for example, by proof that examinations of others in the same class were being conducted or that the names were selected at random (*e.g.*, every fifth name on a list) or by a computer. If a specific class were selected, however, the selection ought to be tied in with some consideration relevant to taxation, such as business or profession, and not be based on irrelevancies, such as political affiliation or religion.
- (2) That the taxpayer under investigation was a large firm with highly complex financial transactions.
- (3) That the taxpayer under investigation has a history of tax evasion or tax fraud, or even that he has frequently made errors in his returns.

Again, however, the judge or commissioner should not have to accept the Service's subjective averment regarding the essentiality of the investigation, but should remain free to make his own determination that this condition has been fulfilled, always keeping in mind the potential danger to individual security if the Service is not kept within its legitimate functions.²⁵³

As an additional precaution, easily complied with, the Service

²⁵³ Unless the Supreme Court is willing to reconsider the decision in *Powell*, these recommendations would have to be implemented by Congress.

might be required to send a "Commissioner's letter" with *every* summons issued under the authority of Section 7602 of the Code. Each letter would contain a sworn affidavit signed by a responsible supervisory official of the IRS, above the level of a revenue agent, attesting that the requested examination was being conducted pursuant to purposes authorized by section 7602 and for no other purposes. In addition, the affidavit would set forth those purposes in detail. This requirement would tend to insulate the summoned party from the uncontrolled discretion of "low-echelon revenue agents,"²⁵⁴ would give the courts a basis for determining whether the stated purposes of the examination are authorized under section 7602 in order to determine whether issuance of an order would constitute an abuse of process, and, most importantly, would make the official signing the affidavit think twice about proceeding with an examination for improper purposes.

Assuming that the foregoing conditions are imposed, along with the suggested presumptions or "ground rules," the Service will still have a large residual area within which its summonses will be freely enforced. In this area, therefore, the potential expansion of power could still occur in spite of the imposition of the suggested conditions. This potential can be curbed by imposing additional conditions to the application of the *Shapiro* doctrine or by making the doctrine inapplicable to tax investigations, and by limiting the application of *Hermann* and *Hannah*. Thus, the Revenue Service would become less attractive as a general fact gathering agency.

In *Shapiro* the Court took notice of testimony before a Senate Committee which indicated that Congress imposed record-keeping requirements because, without them, the Emergency Price Control Act could not have been effectively enforced.²⁵⁵ It would not be stretching things too far, therefore, to require that the doctrine which effects the withdrawal of the privilege against self-incrimination from required records only apply in cases where its use is essential to the enforcement of the act which contains the record-keeping requirements. Thus, in tax investigations the Service should be required to establish that other available sources of information or methods of investigation would not provide sufficient information upon which to base a determination of tax liability. Otherwise, the taxpayer, or a third party summoned in an investigation of a taxpayer, should not be barred from pleading the privilege against self-incrimination as to

²⁵⁴ The Court in *Powell* held that the "necessity" requirement was intended to curb the investigating powers of "low-echelon revenue agents" by requiring them to clear "any repetitive examination with a superior." 379 U.S. 48, 55-56. Thus this recommendation is not entirely inconsistent with *Powell*, although it, too, would require legislative implementation.

²⁵⁵ 335 U.S. 1, 11 (1948).

his own records.²⁵⁶ This requirement would not only make the Service less attractive as a fact-gathering agency for other governmental instrumentalities, but would also further the individual-protective policy of the privilege itself. Furthermore, the Service, which has been somewhat reluctant to assert the *Shapiro* doctrine in the past, could feel free to make use of it in cases where its use would prove most helpful, *i.e.*, where the Service would otherwise be powerless to ascertain a tax deficiency. Alternatively, the required records doctrine could be withdrawn as an investigatorial instrument in all or most tax investigations either by limiting its application to war emergency measures similar to the act from which it sprang or by restricting its availability to investigations of witnesses operating under a license or franchise from the government. There is ample support for either restriction, not the least of which is *Shapiro* itself and the insistent demands of the dissents.²⁵⁷

In situations where the required records doctrine is made available, or where the witness does not claim the privilege against self-incrimination as to the subpoenaed material, the Service's privilege to engage in untrammelled examination of books, records and papers which may later turn out to be irrelevant or immaterial provides additional opportunity for the Service to engage in examinations for non-revenue purposes. If the documents sought are clearly relevant to an authorized purpose on the face of the subpoena—as in the case of the taxpayer's books of account for the years under examination—then the court should be free to order immediate compliance. When, however, the description of the materials sought in the subpoena does not *clearly* indicate the relevance of each particular document sought—either to the years under investigation if entire tax years are being investigated or to the particular transaction if the examination is so limited—then the enforcing judge should pass upon the relevance and materiality of each document to which the summoned party raises an objection. The duty of a court to prevent an abuse of its own processes, reaffirmed in *Powell*, would seem to require as much. To accomplish this purpose, the procedure adopted by the Court of Appeals for the Ninth Circuit and later rejected in *Hermann* might be reinstated in cases involving tax investigations.²⁵⁸ To avoid imposing an undue

²⁵⁶ Cf. Note, 78 Harv. L. Rev. 455, 459 (1964), where it is suggested that the privilege should only apply to documents in the possession of the witness when there is no other person in the same jurisdiction who "has the right to possess or inspect them independently of the government's interest in criminal prosecution, but who would not be incriminated by their contents."

²⁵⁷ Cf. Application of Daniels, 140 F. Supp. 322 n.2 (S.D.N.Y. 1956). Should the *Shapiro* doctrine be overruled or limited, then it might be wise to consider a federal witness immunity act. See Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L.J. 1568 (1963).

²⁵⁸ This result can be achieved by the courts if *CAB v. Hermann* is held narrowly

burden on the trial judge in cases involving a demand for a substantial number of documents, the court might refer the documents to a master for his determination.²⁵⁹

The proposal for a new type of commissioner's letter, suggested above, which would require a supervisory official to set forth the purposes of the examination in an affidavit sent along with a summons, would seem to satisfy the right of appraisal in all cases where the investigation has proceeded to the formal stage of issuing a summons. However, there is still danger to a taxpayer confronted by a revenue agent in what he believes to be a routine audit. By limiting the thrust of *Hannah*, based on the aforementioned functional distinctions between the Civil Rights Commission and the IRS, the courts might require revenue agents to apprise persons being audited of the possible existence of any objectives other than those enumerated in section 7602, if any in fact exist.²⁶⁰ The taxpayer would then be in a better position to utilize his refurbished constitutional and statutory protection. To the extent that every examination for civil violations involves the possibility of uncovering criminal violations, this practice may well tend to frighten otherwise cooperative witnesses into silence. This problem might be mitigated by presenting each taxpayer being subjected to a purely routine audit with a form letter from the Commissioner indicating that such possibility exists in every audit of that nature.²⁶¹

E. *An Ombudsman for the Internal Revenue Service*

One proposal which has been aired frequently of late in connection with the functions of administrative agencies in general may have merit in its application to the functions of the Internal Revenue Service. The appointment of an Ombudsman, a prestigious citizen who oversees the activities of administrative agencies and civil servants, who entertains and investigates complaints from the public, who initiates his own investigations of administrative agency operations, and who may also criticize and publicize, might well be a long range solution to the problem of unwanted expansion of agency powers, as well

to its facts. See Note, Resisting Enforcement of Administrative Subpoenas Duces Tecum: Another Look at *CAB v. Hermann*, 69 Yale L.J. 131, 137 (1959).

²⁵⁹ Fed. R. Civ. P. 53. See 5 Moore, Federal Practice, ch. 53 (1964).

²⁶⁰ That appraisal may not be "disruptive of orderly investigation" is suggested in Newman, Due Process, Investigations and Civil Rights, *supra* note 225, at 744. See also Ludlam, Tax Fraud Investigations: A Plea for Constitutional Procedures, 43 A.B.A.J. 1009 (1957).

²⁶¹ To make these recommendations effective, it would seem to follow that evidence collected in violation of the witness' rights ought to be suppressed. See Fed. R. Crim. P. 41(e); 8 Wigmore, Evidence, ch. 75 (McNaughton rev. 1961, Supp. 1964); Burns, Searches and Seizures: The Suppression of Evidence, 20 Inst. Fed. Tax. (N.Y.U.) 1081 (1962).

as to other vital problems relating to agency functions.²⁶² In view of the size and complexity of the Internal Revenue Service an institution in the nature of an Ombudsman, specialized in overseeing the operations of that agency, and composed of one or more prominent officials with an adequate staff, might be required. The creation of such an institution would perhaps make the need for some of the specific procedural proposals recommended here less pressing.

VI. CONCLUSION

If the potential danger to the right to be let alone had been carefully considered and clearly perceived by the Supreme Court when it passed upon the investigatory powers of the Internal Revenue Service, a compelling ground for granting witnesses greater constitutional and statutory protection in revenue investigations than that afforded to witnesses in investigations conducted by less ubiquitous agencies might have been found. Instead, the Court, in *United States v. Powell*,²⁶³ chose not to differentiate between various agencies. It pointed out that the district courts may refuse to enforce summonses issued for improper purposes or in violation of the technical requirements of applicable statutes, apparently assuming that the power of a court to prevent an abuse of its own processes would prove sufficient to protect aggrieved parties from administrative overreaching.

Unfortunately, prior interpretations of constitutional protections taken together with the Court's narrow reading of statutory requirements and its holding that the burden of proving abuse lies with the aggrieved party, render the hoped for protection illusory. Now that *Powell* has been decided, the danger of undesired expansion of inquisitorial power is greater than ever.

It may be argued, however, that it would be advantageous, from the point of view of governmental economy and efficiency, if one agency, such as the Internal Revenue Service, could act fully to investigate for the purpose of providing and maintaining a repository of information about all citizens for the benefit of all other governmental agencies, whether or not they possess their own investigatory powers. When the size of the nation, the complexities of its institutions, and the problems it faces are realistically recognized, it is not difficult to join with the advocates of such an agency. Yet one must not be blind to the dangers an agency of this sort would cause to the right to be let alone and to the concomitant protection against the tyranny

²⁶² See Christensen, *The Danish Ombudsman*, 109 U. Pa. L. Rev. 1100 (1961); Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. Pa. L. Rev. 1057 (1961); Farley & Farley, *An American Ombudsman: Due Process in the Administrative State*, 16 Ad. L. Rev. 212 (1964); Jagerskiold, *The Swedish Ombudsman*, 109 U. Pa. L. Rev. 1077 (1961).

²⁶³ *Supra* note 242.

of petty officialdom which that right affords, for these constitute part of the fabric of a society where governmental interference with individual privacy has been the exception rather than the rule. If such an agency is to be created, therefore, it should be the product of open debate and resolution on the floor of Congress where all of its dangers and advantages can be aired, and where the need for such an agency can be balanced against the impact it will have on the society.²⁶⁴ It should not be allowed to come into existence by default—by virtue of a gradual judicial release of power into the hands of one agency which, because of its size and pervasiveness of its activities, can one day begin to act as the government's official inquisitor. In short, unlimited power in such an agency should not be permitted in the absence, to quote Mr. Justice Holmes, of the "most explicit language" of Congress.

Since the Supreme Court has not seen fit to interpret legislation authorizing agency intelligence-gathering narrowly even in the absence of explicit language, it does not seem unreasonable to recommend alternatives which, in the main, will restrict future Internal Revenue Service investigations to those conducted for specifically authorized purposes. Among those suggested here are proposals for judicial decision-making well within the analytical technique of American courts and proposals for legislative determinations which are addressed to the Congress. What these proposals urge is the rejuvenation and, in some cases, the creation of controls which will remove from the Service the untrammelled power to determine what investigations it shall make. In addition, the imposition of some procedural and constitutional requirements which will tend to make the IRS less attractive as a general inquisitorial agency is suggested. Whatever slight burden the adoption of these recommendations may impose upon the Service or the courts would seem to be a small price to pay for the concomitant protection of the right to privacy which they will afford.

²⁶⁴ Cf. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 539, 29 U.S.C. § 521(a) (Supp. V, 1964) which expressly authorizes the Secretary of Labor to report facts gleaned from reports required under the act to "interested persons or officials."